JD(ATL)-60-03
Aiken, SC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

WAL-MART STORES, INC.

and

Case Nos. 11-CA-19105
11-CA-19121

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL.-CIO, CLC

Donald R. Gattalaro, Esq. for the General Counsel.
Richard L. Rainey, Esq. (*Womble, Carlyle, Sandridge & Rice*), of Charlotte, North Carolina, for the Respondent.
George Wiszynski, Esq., of Washington, D.C., for the Charging Party.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: The charge in 11-CA-19105 was filed by United Food and Commercial Workers International Union, AFL.-CIO, CLC (Union) against Wal-Mart Stores, Inc. (Respondent or Wal-Mart) on June 28, 2001, and amended on August 20, 2002. The charge in 11-CA-19121 was filed by the Union against the Respondent on July 6, 2001, and it was amended five times, with the fifth amendment filed August 20, 2002. A consolidated complaint was issued on August 28, 2002, alleging that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) interrogating employees concerning their union sympathies and desires, (b) soliciting grievances and promising to remedy them in order to dissuade employees from engaging in union activity, (c) informing employees that it would be futile to select the Union as their exclusive collective bargaining representative, (d) promising to improve employee wages to discourage union activity, (e) threatening its employees with a reduction of their profit sharing because they had engaged in union activities or had cooperated with the Board, (f) ordering its employees to report the union activity of fellow employees to management, (g) denying its employees' request for an employee witness during an investigative interview, and (h) promulgating and enforcing an unlawful no-talking rule to discourage union activity,[1] and (2) violated Section 8(a)(1) and (3) of the Act by (a) issuing verbal warnings to its employees Kathleen MacDonald and Barbara Hall on July 23 and 24, 2001, respectively, and (b) increasing the wages of Kathleen MacDonald and approximately 89 other employees. The Respondent denies violating the Act as alleged.

[1] At the trial herein, the motion of Counsel for General Counsel to amend the complaint to add paragraph 9(i) was granted. That paragraph alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a facially unlawful solicitation policy that it communicated to its employees both in its intranet "Pipeline" and in its employee handbook beginning February 2001.

A trial was held in this matter on February 3, 4, and 5, 2003 in Aiken, South Carolina. By order dated April 1, 2003 this consolidated proceeding was reopened and consolidated with Case No. 11-CA-19902. As here pertinent, by order dated July 2, 2003 a settlement in Case No. 11-CA-19902 was approved, and that case was severed from this consolidated proceeding. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs which were filed herein on August 5, 2003 by Counsel for General Counsel, the Respondent,[2] and the Charging Party, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation with an office and headquarters located in Bentonville, Arkansas where it is engaged in the operation of a chain of retail stores throughout the United States, including a store in Aiken where, during the 12 months before the complaint was issued, it derived gross revenues in excess of $500,000, it purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of South Carolina, and it shipped products valued in excess of $50,000 directly to points outside the State of South Carolina. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Jim Torgerson, a District Manager of a number of Wal-Mart stores, took over the Aiken store in February 2001. He testified that it took some time to assess the issues at the Aiken store, including stock, scheduling - especially regarding the cashiers, and pay.

MacDonald, who has been employed by the Respondent for 13 years as a sales clerk in the candy department, contacted the Union in February 2001 over the internet.

According to the testimony of Torgerson, Aiken's Store Manager, Glenn Florey, left the store in mid-March 2001 and was replaced by Tim Mallett at the end of March or the beginning of April 2001. Torgerson testified that he told Mallett that the stocking problems - having product available to sell - and having enough cashiers to check out customers were the main issues he

---

[2] On August 21, 2003 Counsel for General Counsel filed a Motion to Strike Portions of Respondent's brief in view of the settlement described above, and in view of the fact that, as indicated below, Counsel for General Counsel does not request any further remedy for the violation alleged in paragraph 9(i) of the complaint beyond the remedies agreed to by the Respondent in the settlement agreement approved in Case No. 11-CA-19902 on July 2, 2003. On August 26, 2003 the Respondent filed a response indicating that it now understands the position of Counsel for General Counsel, it agrees to withdraw the settlement bar and 10(b) arguments, and therefore it does not oppose the Motion to Strike those selected portions of the Company's Post-Hearing Brief that raise the specific defenses of settlement bar and Section 10(b). On August 27, 2003 Counsel for General Counsel filed a Motion to Withdraw Motion to Strike Portions of Respondent's brief apparently conditioned on the acceptance of Respondent's agreement to withdraw its settlement bar and Section 10(b) arguments. I accept Respondent's agreement to withdraw its settlement bar and Section 10(b) arguments. Accordingly, Counsel for General Counsel's Motion to Withdraw his Motion to Strike Portions of Respondent's brief is hereby granted.

had to address. Also Torgerson testified that shortly after he took over the Aiken store, an Aiken employee approached him about her pay, and he told Mallett to review the employee's rate of pay and get back with him so they could decide whether to adjust the employee's pay; that Mallett reported that based on the time that the employee had been with the Company, it did not seem that she was being compensated at the level that she should be; that a commendation form was filled out and the employee, Kathy Young, was granted an increase in pay at the end of March or the first of April 2001; that Mallett advised him that employee Thelma Davis asked about her rate of pay for the time she had been with the Company, that cashiers coming in currently seemed to be either at or nearly at where cashiers that had been with the Company for years, and this was due to minimum wage legislation increases under which starting employees were starting at a higher wage rate than associates who had been with the Company for 5 years; that Mallett reviewed Davis' pay, a commendation form was filled out and her rate of pay was increased; that Mallett advised him that the pay rate issue seemed to be more widespread that just Young and Davis; that sometime in the beginning of May or in mid-May he told his Regional Personnel Manager, Gwendolyn Cannon, that it seemed like the wages had become compressed, and this occurred before he heard any reports of possible union activity at the Aiken store; and that he asked Cannon for a wage compression survey, Respondent's Exhibit 4, which shows the employee, how long they have been with the Company, and how much other employees with similar experience and job responsibilities make. On voir dire on Respondent's Exhibit 4, Torgerson testified that there is nothing on the document which dates it, he had no idea where the document came from, the home office created it, he did not know if it was faxed to him or overnighted, there are no fax numbers on the document, he did not know who made the handwritten notations on the document and they were not his, when he received the document it did not have the handwritten notations on it, he believed his assistant, Tonya Moore, possibly put the handwritten notations on the document, he did not know when she made the notations, he believed he received the document in the first part of June 2001, and the employees listed who had a number that is greater than 15 in the right hand column on Respondent's Exhibit 4 received a raise. On cross-examination Torgerson testified that after he assumed the responsibility for the Aiken store, he did not discuss any pay issues with Florey, and he discussed scheduling, staffing, favoritism, the dress code, and the perception of pay disparity between grocery stocking employees and the rest of the employees in the store with Cannon; that Young approached him about her pay right around the time that Mallett took over the Aiken store; that he did not discuss Young's pay with Florey; and that there is nothing but his word for when Respondent's Exhibit 4 was prepared.

Mallett testified that when he became the store manager in Aiken about April 20, 2001 the problems he had to address were employee scheduling, especially for weekends and afternoons, and practice and procedures in that policies were not in place in the store, attendance, favoritism on schedules, merit raises, accounting office cash shortages, invoicing, and some of the bills were not paid timely; that from the outset he coached Aiken employees by walking around the store; that in his first couple of months at the Aiken store his District Manager, Torgerson, asked him to review Young's rate of pay, he printed an employee listing, he forwarded Young's wage adjustment for Torgerson's approval, and Young received the increase in pay; that another employee, Thelma Davis, along with her sister, approached him about their pay, he reviewed a report which lists every employee in the store, their pay, their area, and their length of service, and he got approval to adjust the pay of Thelma Davis; that in the first part of May 2001, after the May 2, 2001 inventory, he suggested to Torgerson that he saw some things in the report that needed to be looked at; and that this occurred before June 8, 2001, when he first learned of union activity.

Cannon testified that after Mallett took over the Aiken store, Torgerson telephoned her frequently and one of his concerns was the pay of two employees; that they decided to run a

wage compression report and then she was involved in getting the approval of the regional and divisional offices; and that she started having the discussions with Torgerson about the possibility of pay adjustments shortly after Mallett took over the store but she really did not have an idea of the exact date. When asked on direct if the discussions with Torgerson about the possibility of pay adjustments occurred prior to her learning of union organizing at the Aiken store, Cannon answered "[y]es. We had discussed an adjustment for the Orangeburg store prior to, and basically it ended up going through the district." (transcript page 268) Cannon further testified on direct that the Orangeburg adjustment occurred in March or April, 2001[3]; that the adjustment was not made at the Aiken store until late June, 2001, after there had been reports of union activity at that store; that the Respondent decided to go ahead with the pay raises anyway because "[I]t was the right thing to do for the store" (transcript page 269); and that the wage compression report was generated by Wal-Mart's Compensation Department in Bentonville at her request. When asked on direct when she made the request for the wage compression report, Cannon testified "[I]t would have been shortly - - I remember vaguely shortly after we got there. There are a couple of different reports that can be generated." (transcript page 271) The involved wage compression report does not have a date on it that it was run. Cannon testified that she did not recall wage compression reports ever having a date on them; that the handwriting on the report is not hers and she did not recognize the handwriting on the report; and that Torgerson and Mallett would have come back to her with the total amount of the wage adjustment and she submitted it to David Simpson for Divisional approval and then it went to LeRoy Schutts for final Divisional approval. On cross-examination Cannon testified that she did not remember the date she requested the compression report; that she did not know what all of the numbers in the right margin of the document mean; that she just received a total amount of the adjustment; that she did not remember what the dollar amount was; that whether an employee receives a four or five percent raise depends on the rating the employee received on his or her evaluation; that in this instance she thought that all of the involved employees received a 5 percent wage increase; that performance was not a factor in this wage adjustment; that when Wal-Mart gives merit increases they are tied to evaluations; that wage compression reports have been run for other stores; and that when she asked her superior to approve the wage increase at the Aiken store her superior was aware of the Union campaign. On recross Cannon testified that an employee's wages could be compressed because they performed unsatisfactorily for a number of years; and that she did not make the decision on who would receive the involved increases in that Torgerson and Mallett made these decisions.

In mid-May 2001 MacDonald asked several employees if they would be interested in supporting the Union.

Torgerson testified that prior to June 2001 he visited the Aiken store on average once a week; that during his visits, among other things, he talks with the employees when coaching while walking around the store; that the Respondent also has a verbal coaching policy, Respondent's Exhibit 2, under which a verbal coaching is not placed in the employee's file but is active for one year in the event that there are any future incidents relating to that particular discussion; that the Respondent has a posted open door policy, Respondent's Exhibit 3, which allows the employee to go to succeeding levels of management; that all of the Respondent's policies are listed on the Pipeline, which, as noted above, is on Wal-Mart's intranet for the employees to access; that the Respondent also has a Grass Roots Process whereby employees fill out a survey once or twice a year relating to what they perceive to be issues in

[3] Torgerson testified that he also went through a wage analysis for his Orangeburg, Georgia store in March 2001 when about 90 employees received a sixty cents an hour raise.

the individual stores or with the company; that the Respondent has a follow up procedure whereby management visits with the employees and addresses their top concerns; that in early June 2001 he learned of union activity at the Aiken store; that after receiving reports of union activity at the Aiken store some people from the home office in Bentonville who are on the Labor Team came to the Aiken store; and that he told the Labor Team about the problems he uncovered at the Aiken store, namely scheduling, favoritism, and the two associates rates of pay which he had already communicated to Cannon. On cross-examination Torgerson testified that on or about June 8, 2001 Mallett contacted him to inform him that, according to a department manager, employees were talking about a union meeting; and that he told Mallett to report to Wal-Mart's union hotline in the Labor Relations Division in Bentonville. On further cross-examination Torgerson testified that a verbal coaching document is not stored in the employee's personnel file, but rather it goes into a separate file.

Georgia Graham, who was employed by the Respondent as an accounting clerk from September 1995 until June 2001, became aware of the Union campaign at Respondent's Aiken store in the early part of June 2001.

Mallett testified that he learned of the possible organizing activity that was going on at the Aiken store from a department manager who told him that he, the department manager, heard some talk about a possible union meeting at some point; that he telephoned Torgerson and informed him of the situation; that he thought that the department manager was Joel Batson, who is MacDonald's manager; that he contacted either the union hotline or Torgerson and he did not remember which order he did it in; that he thought that Torgerson was the one who telephoned the union hotline; that after he spoke with Torgerson, Garth Gneiting from Wal-Mart's Labor Management at headquarters, telephoned him; and that he first learned of union activity at the Aiken store on June 7 or 8, 2001, and the wage adjustment was still waiting on approval from Torgerson. On cross-examination Mallett testified that he thought Torgerson called the hot line; and that later that day Gneiting telephoned him and asked him what the rumor was, and who he had heard it from.

On cross-examination Cannon testified that she learned on Friday June 8, 2001 of a possible union meeting of the Aiken store employees.

On June 10, 2001 MacDonald contacted a Union official to schedule a Union meeting for employees on June 21, 2001.

Torgerson testified that the Bentonville management people, Cannon and Gneiting, came to the Aiken store on June 10 or 11, 2001; that he did not believe that he had Respondent's Exhibit 4, the compression report, for the Aiken store when the Bentonville people came to the Aiken store; that Kirk Williams came from Bentonville to the Aiken store within 5 to 7 days of Mallett's report about union activity; and that he told Gneiting the afternoon of his arrival in Aiken that there were issues relative to the dress code, scheduling inconsistencies, and he had pay discussions with associates. On cross-examination Torgerson testified that he has been a District Manager for 5 years and, other than to train managers, he did not remember Wal-Mart's Labor Relations Team coming to the Aiken store; and that generally the Labor Relations Team would not go into a store unless there was organizing activity, an election, or to train managers.

Gneiting, a Labor Manager who works out of Wal-Mart's headquarters in Bentonville, testified that he came to Wal-Mart's Aiken store on June 11, 2001 after someone in his office was advised by Torgerson, he believed, that there was going to be a union meeting involving Wal-Mart's Aiken employees; and that he left Aiken on June 13, 2001. During cross-examination

Gneiting testified that he thought that John Howard, who works in his department in Bentonville, was the one who took the telephone call about the possible union meeting involving the Aiken employees.

Williams, a Labor Relations Manager who works out of Wal-Mart's headquarters, testified that he heard a voice mail describing the rumors of union activity at the Aiken store; that the voice mail was transcribed and placed in Wal-Mart's computerized remedy data base system; that it was reported that a supervisor was approached and asked to go to a Union meeting; that they knew who the supervisor was but he did not know who the employee who invited the supervisor was; and that his goal as a Labor Relations Manager is to keep Wal-Mart union free. Williams further testified that Wal-Mart learns about the concerns of its employees by the Grass Roots process whereby employees at a certain time every year respond to a confidential questionnaire and have an opportunity to provide feedback about how Wal-Mart and their individual stores are run; that subsequently management might meet with the employees and discuss the concerns and come up with an action plan to make the store a better place to work; that Wal-Mart has an open door policy whereby employees can express their concerns all the way up to the Chairman and C. E. O. in a confidential way without fear of retaliation; and that every day managers are supposed to coach by walking around and visit with the employees to see how their job is going and make sure that the store is run as smoothly as possible.

Cannon testified that she became Regional Personnel Manager in December 1999 and in this position she was responsible for staffing and handling the personnel matters of 77 stores, including the one in Aiken; that before June 2001 she was in the Aiken store at least three times; that two of the visits involved a racial issue and the third visit involved a "regrand" opening (transcript page 262); that Barbara (Tippy) Hall, an employee in Wal-Mart's Aiken store, telephoned her to express her support for the then manager of the Aiken store, Florey, who was suspended; that she went to the Aiken store in June 2001 because the home office received a telephone call that it was possible that a union meeting was going to take place; that the purpose of her visit was to primarily assist management; and that during this organizing drive she was at the Aiken store for four consecutive weeks.

On June 12, 2001, according to the testimony of MacDonald, Gneiting, came into the store and was asking employees about what was going on in the store. MacDonald testified that Gneiting asked her if she wanted to speak to him and the two of them went to the McDonald's which is located in the Wal-Mart store; that Gneiting asked her what the issues were in the store, and she told him that people were upset about general overall treatment, about the pay issues, about the scheduling and things of that nature; that Gneiting said that he had heard rumors about union activity and he asked her if she had heard anything about that; that she told Gneiting that she had not heard about union activity; and that Gneiting asked her to give Mallett a chance because he had just gotten to the store and these problems would not be settled overnight. On cross-examination MacDonald testified that she did not seek Gneiting out to talk to him; that Gneiting came to the Candy Department and asked her if she wanted to speak to him; that other employees had asked Gneiting to speak to her; that before Gneiting approached her another employee, identified only as Becky, told her that she was going to ask Gneiting to speak to MacDonald and she said okay; that according to her diary this meeting occurred on June 11. 2001; and that she did not write in her diary that Gneiting asked her whether she knew anything about the rumors of a union. "MON JUNE 11,, 2001" appears at the top of page "PWM-0006215" of MacDonald's notes, Respondent's Exhibit 1, and "TUES JUN 11, 2001" appears at the top of the next page, "PWM-0006216," of the notes. The latter page, as here pertinent, reads as follows: "I spoke to Garth about our concerns. He said to give new manager Tim a chance and things would take a while to change. He said they heard the rumor of a union."

Gneiting testified that on the afternoon of June 11, 2001 MacDonald initiated a conversation with him in that she and another employee, Bea Gant, came to the manager's office, knocked on the door, and asked to speak with the person from Wal-Mart's home office; that the two employees were advised that when the management meeting was over Gneiting would come to where they worked; that he met with MacDonald in the McDonald's inside the Wal-Mart store; that MacDonald told him what positions she held in the store, and what was wrong in the store with the past and present management; that he did not ask her what the issues were in the store; that he told MacDonald that he was at the Aiken store with the Labor Team because (1) there had been reports of a potential union meeting, (2) to answer questions for employees, and (3) to train the management team; that he did not ask MacDonald if she knew anything about union activity and he did not promise any particular solutions to any of the concerns that McDonald raised; and he said that she should give the new store manager a chance. On cross-examination Gneiting testified that he was not aware that MacDonald was involved in the Union campaign before he came to the Aiken store on June 11, 2001; that he was never told that MacDonald was the person who initiated the Union campaign at the store; that he was told that Gant went to Union meetings and then reported back to Mallett about the meeting and about which employees attended; that Gant told Mallett that MacDonald and Hall attended the Union meetings, and Mallett conveyed this information to him; that under Company policy this information must reported to Labor Relations; that during meetings with employees management brings up union matters with or without questions from employees; and that he has probably told employees about union fines and assessments against members.

Torgerson testified that about mid-June, 2001 he learned that MacDonald had been talking to the Union.

On cross-examination Cannon testified as follows:

Q. Okay. Did you at any time find out that any employee had been going to Union meetings and reporting back to the Store Manager?

A. No.

Q. Never learned that?

A. That an employee was reporting to management?

Q. Yeah - -

A. No, sir.

Q. - - had told the manager about who had gone to Union meetings, about going to Union meetings.

A. I don't recall that. The very first visit, there was, actually it was a good visit. We left and came back and went to Newberry for Grass Roots.

Q. Okay. I want to make sure you understand my question.

A. Okay.

Q. I am not talking about just when you initially got there, I'm talking about at any time did you ever learn that there was an employee who had gone to Union meetings and

had reported to management about those meetings?

A. Later there was an employee that volunteered some information to management.

….

Q. do you recall what information she volunteered?

A. If I'm not mistaken, she volunteered some information about what was given to them at the meeting.

….

Q. Did she tell them who attended?

A. I don't remember if she said specifically who attended, but I think she might have. [Transcript pages 293 and 294]

Page two of Respondent's Exhibit 5 are talking points dated June 19, 2001. Mallett testified that he believed that he presented these talking points to employees and that he pretty much read the following talking points:

> Like always we try to keep you informed on what is going on in our store. Most recently, some associates [(employees)] in this store have been talking about having a union meeting. We would like to give you some information about unions.
>
> At Wal-Mart we respect the individual rights of our associates and believe you don't need a union to speak for you. Wal-Mart is not anti-union rather pro associate. You may have family members, neighbors and we certainly have customers that are union and that is OK. But we don't feel unions are right for Wal-Mart.
>
> Union organizers will promise anything to get associates to sign a union authorization card. They may promise you better benefits, better hours or higher wages, but can they guarantee you any of these things - - the answer is NO.
>
> All a union can do is ask the company for things, they can not demand anything.
>
> Let me encourage you NOT to sign a union authorization card, but to say NO to any pressure you may receive.
>
> If you have any questions please get with me or any member of management.

Mallett testified that he did not prepare any of the talking points; that he did not know who prepared them; that Williams provided the talking points to him; and that he was not sure if Williams was at the June 19, 2001 meeting.

On June 21, 2001 the following corporate officials came to Wal-Mart's Aiken store: Cannon, Williams, Gneiting, and Torgerson. MacDonald testified that Williams had never come to the Aiken store before. On cross-examination MacDonald testified that she had never seen Cannon at the Aiken store before this; that she had seen Cannon's predecessor, Mary Smith; and that Torgerson's came to the Aiken store in February 2001.

Also on June 21, 2001 MacDonald, along with about 40 other employees, attended a meeting conducted by Torgerson at 8 a.m. in the employee break room. MacDonald testified that neither Hall nor Graham were present; that Torgerson said that he and the store management team would be leaving the store for a few hours and they had called managers from other stores to come to the Aiken store and answer calls "or if we had any problems that they would take care of them" (transcript page 61); and that this had never happened before.

On June 22, 2001 MacDonald attended a meeting called by the Respondent with about 30 other employees in the Personnel Office at about 10:30 a.m. MacDonald testified that neither Hall nor Graham were present; that Mallett opened the meeting and then turned it over to Williams, who said that Wal-Mart was not anti-union but he felt that the employees did not need a third party; that Williams said that after the employees watched a film, if they had any questions they could raise their hand; that after the film was shown, Williams again said that Wal-Mart was not anti-union but it did not feel that the employees needed third party representation; that Williams also said that all the Union was interested in was collecting Union dues, and while the Union promised better wages and benefits, Wal-Mart would have the final say[4]; that Williams told the employees that if a union member breaks a union rule he or she must appear before a union tribunal and answer the charge; that when Williams asked if there were any questions she asked him, as here pertinent, how do employees get better wages and benefits and Williams replied through the grass roots[5]; that Williams told the employees that if they signed a union authorization card, they would be signing away all of their rights; that after the meeting, while still in the Personnel Office, Williams asked her how much she was making an hour, she told him, and he said that it did not sound right at all for a long term-employee; that Williams then took her to meet Cannon, who was with Torgerson in the manager's office; that Cannon introduced herself and asked MacDonald what the issues were in the store; that she told Cannon that she did not think it was fair that she was getting paid less money than a grocery employee who had been there for less time than her and who was doing the same work; that Cannon said that the employees' wages were being looked into; that she told Cannon that she had been passed over for two job promotions even though she was well qualified for both positions; that before Williams left the room he told MacDonald that her wages were being looked into; that Cannon asked her to give Mallett a chance since he just got there; and that Cannon said that they would be getting back to them about the wage issue. On cross-examination MacDonald testified that Wal-Mart has an open door policy which allows employees to telephone a number to talk about issues or benefits; that she has used the open door policy to complain about gender discrimination, scheduling, and wages; that she has complained about wages in the past to Williams, Cannon, Smith, and Florey; that with respect to gender discrimination, she is a plaintiff in a lawsuit against Wal-Mart wherein she alleges that she has been denied promotions because of her gender, and there is a pay disparity between her and male employees; that Williams "out of the blue" (transcript page 92) asked her what her wage rate was; that as indicated in her diary, Williams question was asked in the context of her complaining to him about wages; that Williams did not promise a wage increase but rather he said they were looking into them; that Cannon did not make any promises that she would fix her

[4] MacDonald's notes, page PWM-0006218 of Respondent's Exhibit 1, indicate as follows: "He [Williams] said if the Union promises better wages and benefits but ultimately Wal-Mart has the final decision."

[5] MacDonald explained that grass roots is a once a year questionnaire that employees receive from management soliciting responses regarding how the management team is doing and asking the employees if they have any concerns with respect to the store. On cross-examination MacDonald testified that afterwards management would meet with about 12 employees at a time and go over the grass root questions.

problems; and that when Cannon asked her if she ever thought about being a manager she told Cannon "not at this point in time" (transcript page 97).

Torgerson testified that he had a discussion with Cannon and MacDonald in the Assistant Manager's office; that Williams was present but he did not remember if Williams stayed the whole time; that MacDonald said that there were problems in the Aiken store, including inconsistencies with the dress code, a potential pay discrepancy between grocery stocking employees and the rest of the store, and promotions; that Cannon asked MacDonald about her work history and Cannon said that there were always opportunities in the Company; and that MacDonald was not promised a wage increase, a promotion, or that anything would be fixed. On cross-examination Torgerson testified that during this meeting neither Cannon nor any other manager asked MacDonald how much she was earning.

Cannon testified that she first met MacDonald when there was a meeting in the manager's office in the Aiken store and she and Williams had a conversation with MacDonald; that MacDonald made complimentary remarks about Mallett and Torgerson and they discussed the positions MacDonald held in the past; that MacDonald spoke about some of the problems they had in the past in the store; that she did not promise to take any action to address the issues raised by MacDonald, she did not promise MacDonald any sort of a pay increase, and she did not tell MacDonald that her wages were being looked into; that she attended the video presentations to the Aiken employees that had to do with union organizing; and that during the meetings where videos were shown Williams did not tell employees that it would be futile to select the Union as a representative or that it would not do any good. On cross-examination Cannon testified that she did not think that she attended every meeting when the video was shown; that the video described the employees' rights and it referred to a union authorization card; that after the video was shown to employees Williams made comments but she did not recall him specifically commenting on the union cards, on the bargaining process, on the fact that the Union can promise employees everything, and the Union can ask Wal-Mart for anything during negotiations but Wal-Mart decides what it is going to give; that she was not positive that MacDonald, while she was speaking with Williams, mentioned any problems about her pay, or that people on the grocery side of the store were making more money than the people on the side of the store MacDonald worked on; that she did remember MacDonald talking about being denied promotions she deserved in the past; that she vaguely remembered pay coming up in the discussion with MacDonald but she did not remember exactly what MacDonald said; and that she has a horrible recollection and really does not remember much of what happened during the involved period of time.

Williams testified that he first visited the Aiken store on June 21, 2001; that that afternoon they began showing the employees at the Aiken store an educational video entitled 'Sign Now, Pay Later' which explains what an authorization card is; that MacDonald was present at one of these video presentations and she asked if the employees would not be the union; that he responded that employees would join but the Union is a business which seeks to speak for other people and take their money; that MacDonald asked how employees can obtain better wages and he responded that the employee could use Grass Roots or speak with the manager individually about their pay concerns; that he did not tell employees that choosing the Union as a representative would be futile; that he did not say that Wal-Mart would have the final say; that after the meeting several employees, including MacDonald, stayed; that MacDonald talked about pay, promotion issues, the dress code, and scheduling; that he introduced MacDonald to Cannon and participated in a discussion with Cannon, Torgerson, and MacDonald for a brief period of time; that Cannon was at the Aiken store because typically employees "have questions that are not appropriate for me to respond to or that I don't have the ability to change or get resolved [s]o we have someone [present] that has the ability to do that in

the normal course of their function" (transcript page 479)[6]; that he did not promise to increase MacDonald's wages or do anything in particular for her, and while he participated in the discussion neither Cannon nor Torgerson promised to do anything for MacDonald; that he never heard Cannon make any promises to employees that she would "fix all their problems and give them a wage increase" (transcript page 491); that in his various conversations with MacDonald he never promised to do anything for her or to fix her problems in any way; that during the 'Sign Now, Pay Later' video session Hall said it sounds like Wal-Mart where you can get fired for anything anyway and he responded that with employment at will, the employer has the ability to terminate someone for any reason as long as it is not a discriminatory reason, but she needed to look at Wal-Mart's track record, and it did not fire people for no good reason; that he also discussed Union tribunals and the Union being a business at the meeting MacDonald attended; and that after the meeting when he was talking to MacDonald individually he told her that Torgerson and Cannon were reviewing the store's wages but he did not tell MacDonald that her personal wages were being reviewed or that there was going to be a pay increase. On cross-examination Williams testified that the Regional Personnel Manager would be physically in the store much more time during a union campaign than they would otherwise and employees would have access to the Regional Personnel Manager while she was in the store; that MacDonald told him right after the video meeting that she thought that some people were being paid less than others; that MacDonald told him that she did not feel that she was paid what she should be paid for the length of time she had been with the Company; that when he, Cannon, and Torgerson spoke with MacDonald she may have said that she did not think her pay rate was where it should be; and that Torgerson or Cannon likely or probably then said that they were reviewing the store's wage rates "during that time." (transcript page 522)

On June 26, 2001 Cannon came into Graham's office. According to Graham's testimony, Brenda Burns, another accounting clerk, was present. Graham testified that Cannon asked her what were the problems in the office and she told Cannon that there was no communication, there was favoritism, and there were things going on in the office that needed to be taken care of; that Cannon went to speak to Brenda, and then Cannon said that she would get back with Graham the next day; that they never saw Cannon again; and that this was the first time in her years with Wal-Mart that a group of Company officials came to the store to speak with employees about problems. On cross-examination Graham testified that Cannon only promised that she would get back to the employees the next day and let them know what she could take care of.

Cannon testified that she went to the cash office because she wanted to meet Hall and put a face with the name; that there were several problems with cash shortages in the office; that she did not remember verbatim what she discussed with Graham and it was a very general conversation; that she would not have promised Graham that she would fix Graham's concerns; that she did not remember how she left the meeting with Graham; that at the time she did not know that Graham was involved in union organizing; and that shortly after she met with Graham, Graham was terminated for an issue that was a cash office issue. On cross-examination Cannon testified that she did not recall if someone was in the office with Graham when she visited with Graham; that she did not recall the specifics of her conversation with

---

[6] Subsequently, after a short break (transcript page 485), Williams was allowed to testify over the "asked and answered" objection of General Counsel that that Cannon would have been in the store to answer any questions at it related to personnel functions that she had, or questions about benefits or pay or something specific about Wal-Mart that he might not be able to answer or it would not be appropriate for him to answer based on his position. (transcript page 491)

Graham; that as a Personnel Manager she often asks 'how are thing going' (transcript page 298); and that Graham was not terminated over a cash office issue but rather she was discharged for letting someone in her household use her discount card. On redirect Cannon testified that she did not speak to Graham to find out what problems she had; and that she did not attempt to dissuade Graham from engaging in any union activity since she did not know Graham had anything to do with union activity.

Also on June 26, 2001 MacDonald was summoned by Grocery Co-Manager Jennifer Aiken to the office where MacDonald met with Aiken, Jane McGuire, Bill Shriver and Batson, who was her supervisor. Aiken expressed concern with the fact that the candy department sales were down double digits and MacDonald, according to Batson, was not in the candy department and was doing a little too much visiting with other employees; that Aiken told her to fill the candy wall by 11 a.m. and then report to Batson to determine whether he had any other duties for her; that she decided to keep a record of where she was and what she was doing in case Batson accused her of not working in the candy department; and that Batson would know if she attended a meeting and consequently she did not indicate in her diary all of the meetings she attended.

On June 27 or 28, 2001 Graham attended a meeting conducted by Company officials in the break room around 6 p.m. with about 40 to 60 employees. Regarding this meeting, Graham testified that Hall and MacDonald were not present; that Mallet, Williams, who was a Corporate Labor Relations Manager from Bentonville at the time, and Shriver, who was the store's Assistant Manager at the time, conducted the meeting; that Mallett said that there were problems at the store that needed to be straightened out, he was aware of this when he came to the store in April 2001, and he was going to straighten them out; that Williams told the employees that there were things going on about a union, the employees should not pay attention to what the Union was saying, the Company was there to help the employees and they would not steer the employees wrong; that Mallett said that there were things with the raises that needed to be taken care of, he was going to have things straightened out, and he would have Shriver talk to the employees, find out where everybody needed to be, get things straightened out, and bring everybody up to standards; that before this meeting she had never heard that the Company was reviewing employee wages; and that at no time prior to this meeting had any Company official told her that the Company was considering giving wage increases to any employee. On cross-examination Graham testified that she was fired by the Respondent on June 30, 2001 supposedly because of a discount card violation. On redirect Graham testified that there was an open door policy at the Aiken store which to her meant that employees could go to management and management could come and speak with employees.

Mallett gave the following testimony on direct:

Q. During the store meetings, did you ever talk about wage increases as a response to Union activity?

A. No, sir.

Q. Did you ever promise them any wage increase would occur?

A. No, sir.

Q. Did Mr. Williams ever make any promise of wage increase?

A. No.

Q. Did any other member of management make that promise that you're aware of?

A. No. [Transcript page 357]

Williams gave the following testimony on direct:

Q. At the store meetings or in any of these video training sessions, did you ever hear Mr. Mallett promise employees a wage increase of any sort?

A. No. [Transcript page 489]

Williams also speculated as to what he would do if he heard Mallett promise employees a wage increase.

On June 28, 2001 MacDonald met with Mallett, Torgerson, and the bakery manager in the security room at about 11 a.m. MacDonald testified that Mallett told her that he had been looking over her wages and he felt that she was not where she should have been and he was going to give her an 81 cent raise, and the raise was not a cost of living raise, or based on an evaluation, or a merit raise but it was being given because she was not at the level she should have been at; and that Torgerson told her that he could not tell her not to but he would prefer that she not tell anyone because not everyone was going to get a raise. On cross-examination MacDonald testified that at the outset she asked to have a co-worker with her and Mallett said that was her right, but the meeting involved a good thing and she did not need a co-worker present.

Torgerson testified that MacDonald was told that employees had complained about their pay and in reviewing the store management had found discrepancies, and her rate of pay was going to be increased; that MacDonald did not say that Wal-Mart was giving her the wage increase to squelch union activity; and that union activity was not discussed during this meeting.

On June 28 or 29, 2001 Hall, who has been an employee of the Respondent since September 1995 and at the time was in the accounting office, attended a Company meeting in the Personnel Office about the Union. With respect to the meeting, Hall testified that neither Graham nor MacDonald were present; that about 15 employees were present; that Mallett told the employees that they were going to see a video about the Union; that after watching the video the employees were asked by Williams if they had any comments or statements; that she told Williams that the video did not remind her of the Union but rather it reminded her of Wal-Mart because anyone could be fired at any time for no reason; that Williams then said that could happen anywhere and she told Williams that he just contradicted himself; and that when she went back to the accounting office after the meeting Shriver, who was in the accounting office, asked her what she thought about the meeting and she told him that it was a waste of her time.

On cross-examination by Counsel for General Counsel Torgerson testified that since the pay raises for the Aiken employees were effective on or about June 28, 2001, he learned about MacDonald talking to the Union before the raises; that there were rumors about a Union meeting, the Union meeting was held, and one of the employees voluntarily reported back to Mallet; that in mid-June 2001 he shared the calculations with respect to the impact on the budget in the light of Respondent's Exhibit 4 with Cannon and Regional Vice President David Simpson after he learned about the Union campaign; that according to Respondent's Exhibit 4, there were two different ways the pay rate could have been adjusted, namely either four or five percent; that it was not his decision to consider a four percent raise instead of a five percent

raise; and that he did not know who made this decision. On further cross-examination by Counsel for the Charging Party, Torgerson testified that he believed that the Aiken employees received a four percent raise. And on further cross-examination by Counsel for General Counsel Torgerson testified that the raises were based on the information on the far right hand column of Respondent's Exhibit 4 and he did not know whether it was four or five percent.

Mallett testified that it was not his approval that pushed the wage adjustment through, but he guessed that it had been approved and they decided to go ahead and proceed with it because they "knew it was out of wack on some of the wages and we wanted to get that adjusted for the … [employees]" (transcript page 340); that 90 of the 425 employees in the Aiken store received a pay adjustment; and that the employees who received pay adjustments were told individually that it was not a merit increase but rather the adjustment was made to narrow the pay gap between those who had worked for Wal-Mart for a long time and the employees who had just started. On cross-examination Mallett testified that in addition to Respondent's Exhibit 4 which was generated by the home office, he ran an employee listing at the store which lists each employee, their length of service, where they work in the store, and their rate of pay; that the store list does not formulate compression as did Respondent's compression report, Respondent's Exhibit 4; and that the store list does not show what competitors of Wal-Mart in the area are paying its employees.

On June 29, 2001, according to her testimony, MacDonald attended a meeting in the Electronics Department at 9 a.m. with all first shift employees. MacDonald testified that Mallett and Williams conducted the meeting; that neither Graham nor Hall attended; that Mallett discussed what there sales were in the district; that Williams then told the employees that a charge had been filed with the National Labor Relations Board (Board) concerning an employee, a co-manager, and a department manager; and that Wal-Mart would have to hire expensive lawyers to fight this charge and some of these expenses could possibly come out of the employees' profit sharing. On cross-examination MacDonald testified that she did not know on what date she attended this meeting, but it was not held on June 29, 2001; and that her diary, Respondent's Exhibit 1, does not have an entry regarding Williams telling employees that a charge had been filed with the Board, Wal-Mart would have to hire expensive lawyers to fight this charge, and some of these expenses could possibly come out of the employees' profit sharing.

Torgerson testified that there are daily meetings in each store; that there was no discussion with employees of the effect that Union activity might have on any of the Company profit sharing plans; that he never heard Williams address this subject in any way; that Mallett normally presented the talking points, which were in writing, to the employees; and that he was not present at any store meeting where a member of management (a) made a promise to improve employee wages, (b) said that he (Mallett) was there to clean things up and get things back to standard, or (c) said that it would not do any good to select the Union as their representative, it will be futile. On cross-examination Torgerson testified that Williams did tell assembled Aiken employees that charges had been filed with the Board; that Williams may have said that some disgruntled employees had brought the charges; that he believed that this was in one of the talking points; that Williams may have said that Wal-Mart will have to hire attorneys to defend the charges; that he was certain that no employee asked whether it would affect their profit sharing, he did not hear that statement; that he did not know if he attended all of the meetings with employees on June 27, 2001; that he attended most of the meetings where people from Wal-Mart's Labor Relations came to talk at the daily meeting; that the meetings for the three shifts were held at 9 a.m., 4 or 5 p.m., and 10 p.m.; that he did not attend all of the meetings when people from Labor Relations were there; and that he did not keep track of which employees meetings he attended.

Cannon testified that she did not remember profit sharing ever coming up at an employee meeting where Williams spoke; and that she never heard Mallett at employee meetings promise to increase wages. On cross-examination Cannon testified that she did not participate in a meeting when Williams spoke to employees about the charges that were filed in this case; that she did not recall being there for the meeting about the charges; that there was a meeting where management informed the employees that the charges in this case had been filed and she thought she was there; that she did not recall Williams telling employees that certain disgruntled employees and the Union filed charges against the Company and Wal-Mart would have to hire lawyers to defend against those charges; that she remembered that the employees were told that the charges had been brought and not to be alarmed; and that the Talking Points for this meeting did not refresh her recollection as to what was said.

Mallett testified that Wal-Mart made two video presentations to the Aiken employees toward the end of June or the first part of July, 2001; that the video meetings were separate from the store meetings; that he attended a majority of the video meetings; that during one of the video presentations an employee asked about the outside attorneys Wal-Mart was going to retain and Williams said that the cost would not be charged against the Aiken store but it would be charged to Wal-Mart; that the employees have a "stake holders bonus" or profit sharing plan based in how well the store is doing; and that Williams did not tell employees that it would not do them any good to be represented by a union at either the video presentations or the store meetings.

General Counsel's Exhibit 2 are "Talking Points to announce ULP's" for the Aiken store. While they are dated June 27, 2001, Williams testified that they could have been given at a later time. They read as follow:

> As you know, we here at Wal-Mart want to keep you informed of things that affect you.
>
> Many of you know that a union and some disgruntled associates are trying to organize the associates in this store. The union is trying to get associates to sign union authorization cards.
>
> Today, the union filed a ULP against the store. A ULP is an allegation that Wal-Mart has done something unlawful. ….
>
> ….
>
> We completely and fully deny these charges. This is an attempt by the union to disrupt our business and discredit our management team. We will continue to do the right thing in the store for both our associates and our customers.
>
> So, what's the next step? Wal-Mart will have to hire attorneys to defend the charges. Let me just say that Wal-Mart will fight these charges and defend you and our store to the fullest extent that the law will allow.
>
> We will keep you informed of any developments that occur and please make sure that you come to us with any questions.

On cross-examination Mallett testified that he thought he might have given these talking points; and that he "stuck real closely to the talking points, all the ones that … [he] covered." (transcript page 415)

Williams testified that he prepared the talking points dated June 27, 2001 and Mallett delivered them; that these talking points were used in three meetings (one for each of the three shifts) held on or about June 29, 2001 and he was present at all three; that he knew that MacDonald was not present at the morning meeting, which was held in the Toy Department, because she told him that she was not going to attend because she had too much work to do; that one of the questions asked at this meeting was who paid for the lawyers, and he responded that the Legal Department's expenses or outside counsel are absorbed by Wal-Mart's corporate overhead account and it does not affect the store in any way; that at the store level there is a stake holder bonus program whereby if the store meets certain criteria, then the employees in that store would get a percentage of the store's profits; and that there were questions as to how it would affect profit sharing and he responded that any expense of the corporation affects profit sharing. On cross-examination Williams testified that the employees did not ask how much the unfair labor practice proceeding would cost; that the employees asked if the cost would affect the store or their profit sharing; and that he gave a very detailed answer and Torgerson and Mallett were there during the explanation.

Torgerson testified that the wage increase to about 90 Aiken employees (out of approximately 425 Aiken employees) went through Cannon and Simpson; that the fact that there was union activity at the Aiken store did not have anything to do with Wal-Mart's decision to give this wage increase; and that employees were told that based on conversations he had with some of them that it was decided to review the wage rates of the store as a whole and it was determined that certain of the employees' pay rate should be increased. On cross-examination Torgerson testified that after he signed off on the raises, Cannon and Simpson had to approve the raises; and that he told Cannon what the dollar impact of the raises would be but she did not ask him why five percent and not four percent.

On July 2, 2001, according to her testimony, MacDonald attended a meeting in the Toy Department at about 9 a.m. with all of the first shift. MacDonald testified that neither Graham nor Hall attended; that Mallett and Torgerson conducted the meeting; that Mallett told the employees how the sales were, what was new in the Company, and that Wal-Mart had a no solicitation rule under which the only solicitation allowed was that authorized by Wal-Mart such as the Children's Miracle Network and the United Way; and that Torgerson told the employees that when they left work that day there might be Union representatives outside the store giving out literature, and if they were approached by one of these representatives or if they saw one of these Union representatives they were to tell management right away. On cross-examination MacDonald testified that that her diary, Respondent's Exhibit 1, does not have an entry regarding this meeting but she did make entries for when she went to lunch, returned from lunch, went on a break, and went to the service desk.

Torgerson testified that he did not ever give instructions to Aiken employees to report (a) on union activity of other employees, (b) if there were union representatives outside the Aiken store, or (c) any organizing activity they observed; that he told employees that there was a possibility that union representatives may come in the Aiken store; that employees were told that Wal-Mart is not anti-union; that the Company had a meeting at which it told Aiken employees what they should do if somebody telephoned them at home about the Union; and that the employees were told by the Company that it was their right to talk to Union representatives who telephoned them at home but Wal-Mart did not give out their telephone numbers or addresses. On cross-examination Torgerson testified that there is no Wal-Mart rule against a Wal-Mart employee telephoning or visiting another Wal-Mart employee at home; and that there is no Wal-Mart rule about what a Wal-Mart employee can talk about when telephoning or visiting another Wal-Mart employee at home.

Mallett testified that he was not sure if he gave the undated talking points which are included as page four of Respondent's Exhibit 5 but he did remember these talking points being covered at a store meeting. They read as follows:

> Some associates have brought it to management's attention that they have been getting some unwanted phone calls and visits at their homes by union organizers.
>
> We want you to be aware that if you do receive phone calls or visits at home you do have rights. You have the right to talk to the union representative, and even more important you have the right not to talk to the person. You can treat these union representatives just like you would any other salesperson. You don't have to be bothered by union representatives. If you feel like your being harassed at work or away from work you also have rights.
>
> If you are receiving phone calls or visits at your home, we want you to know that Wal-Mart maintains the confidentiality of associate's information. (home address and telephone number, etc.) Wal-Mart will not voluntarily release any information about associates. If in fact, we determine that associates are divulging or taking unauthorized confidential information, then the appropriate action will be taken.
>
> If you have any questions please visit with a member of management.

Mallett further testified that employees were not instructed at this meeting to report whether they saw union organizers on the premises; and that he never gave such instructions and he never heard Torgerson or Williams tell employees to do such a thing. On cross-examination Mallett testified that these talking points were prompted by employees telling him and other members of management that they were receiving telephone calls at home about the Union.

Cannon testified that she never heard Torgerson tell employees that if they ever saw Union representatives outside the store they were to report it to management.

Williams testified that he believed that he prepared the talking points dealing with employees receiving telephone calls at home regarding the Union; that he never heard Torgerson suggest to employees that they should report to management if there were any Union organizers on the premises and he, Williams, did not tell employees that they were required to do this; and that he did tell employees that Wal-Mart has a solicitation policy and that if they feel that somebody is in the store soliciting them or they feel that they are being bothered, they have the right to come to management and the solicitation policy will be enforced.

Between July 2 and 20, 2001 Hall, who did not work between June 30, 2001 and July 20, 2001, visited with MacDonald in the store.[7] Hall testified that the visit took place in the candy

[7] Hall was out because she suffered an anxiety attack in the accounting office in the Aiken Wal-Mart store on June 30, 2001 and Mallett requested that she obtain a fitness to return to work form from a doctor. She testified that Mallett and Torgerson told her that she was suspended and when she was told she could go to a doctor of her choice, she went to her family doctor but Mallett would not accept her doctor's release because Mallett wanted her to go to the Aurora Pavilion, where someone goes who has mental problems, to see a psychiatrist; that she saw the psychiatrist who released her to return to work; that Mallett had asked her to have the doctor call him prior to the exam, that did not happen, and that is why Mallett sent her

Continued

department and Batson, the Candy Department Manager, was present; that she asked MacDonald when there was going to be another Union meeting and MacDonald told her within the next few days; and that Batson was 5 or 6 feet away during this conversation.

MacDonald testified that on July 9, 2001 she spoke with Hall in the candy department while Batson was present; that Hall asked her for her telephone number and Hall asked her about the Union meeting; that she invited Hall to come to the Union meeting; and that Batson was about 5 to 6 feet away when she and Hall had this conversation and he just stood there watching them and listening. MacDonald also testified that once she tried to get the telephone number of a third shift employee who had shown some interest in coming in the Union, to solicit her to come to a Union meeting and another employee told her that the telephone number was in the telephone book.

On July 11, 2002 Hall telephoned MacDonald and told MacDonald that she knew of some other people who might be interested in attending a Union meeting; and that Hall asked her if she wanted their telephone numbers and she told Hall to give the numbers to the Union representatives.

Mallett's notes, General Counsel's Exhibit 3, contain the following:

Bea [Gant] 7/12/01

Bea approached me in soft lines and said I went to the meeting last night. I said O.K. She said do you want the info. I got. I said legally I can't ask you about this but if you choose to give me any information that's up to you.

Later Dave called me in the office. He told me Bea was in the lounge and she pointed out something on the table. It was some union pamphlets. Dave gathered up the trash as well as the union material and brought to the office.

Later while talking to Kirk on the phone Bea came to door and brought me a box (Staples) w/union info. in it as well as a 2 page letter detailing the meeting.

Williams testified that Wal-Mart was informed of the identity of the union supporters who attended a Union meeting when Bea Gant came forward and shared with management her experience at the Union meeting, indicating that Hall and MacDonald ("they" transcript page 525) attended the meeting; that he did not know Hall had gone to a Union meeting and he had no idea she was involved with the Union; and that when he first spoke with MacDonald he did not know she had attended a Union meeting, he found out later.

On July 24, 2001 Mallett summoned Hall to his office. Jane McGuire, who is the Bakery Department Manager, came to the accounting office to get Hall, and she was present during Hall's meeting with Mallett. Hall testified that when McGuire got her she asked McGuire what had she done now and McGuire said that she did not know; that she asked Mallett if she could

---

to another doctor; and that Mallett got upset because he wasn't able to talk to her doctor and tell him what to look for. Subsequently Hall testified that when she suffered the anxiety attack, for which she takes medication, she got real weak and she sat down on the floor; that Joey Galloway, Graham, and Burns were present when she had the attack; and that subsequently she received a certified letter in the mail from Mallett advising her that she was on a medical leave of absence.

have someone in the office with her and Mallett said "No"; that Mallett did not give her a reason for refusing to allow her to have a witness with her; that she asked Mallett for a witness because she thought that she was going to be punished in some way; that Mallett told her that she could not have an employee witness; that Mallett told her that several employees had come to him and told him that Hall was asking for telephone numbers and they did not want to give them to Hall; that Mallett said that he had affidavits from the employees regarding the matter; that Mallett told her that she "couldn't talk on or off the clock in the store on the sales floor and if he caught … [her] talking to anyone that he was going to write … [her] up for anything that he seen fit" (transcript pages 34 and 35); that Mallett did not reference any rule but he accused her of soliciting and said she violated the soliciting policy; that she believed that Mallett was giving her a verbal warning because usually the employee gets a verbal warning before the employee gets written up and Mallett told her that he was going to write her up for an infraction; that at no time prior to July 24, 2001 did any Company official tell her that she could not talk while working; that during her prior 6 years at Wal-Mart employees had spoken with each other and with supervisors during work time about non-work related topics; and that before her meeting with Mallett no manager had ever told her that there was a limit on what employees could talk to each other about on the sales floor or what employees could talk to customers about on the sales floor. On cross-examination Hall testified that prior to this meeting with Mallett she had approached another employee, Mary Sprouse, and asked her for her home telephone number; that during her meeting with Mallett she did not deny asking Wal-Mart employees for their telephone numbers; that Mallett did not show her the written solicitation policy; that she had never seen the solicitation policy in the employee handbook; that she did receive a copy of the employee handbook and she read it; that she never accessed Wal-Mart's national computer intranet "Pipeline" policies; that she did not remember telephoning Mallett right after this meeting; that she thought that she was in trouble because it seemed like every time she had a meeting with Mallett she was in trouble for something; and that she has not received any other discipline for talking on the job. On redirect Hall testified that prior to her meeting with Mallett no supervisor had told her that it was against Company rules to ask another employee for their telephone number; and that she could have employees as her friends.

Mallett testified that he gave a verbal coaching to Hall regarding solicitation; that Wal-Mart does not allow solicitation in the work areas of the store; that Respondent's Exhibit 6, Policy PD-38, is Wal-Mart's policy regarding solicitation and distribution of literature, which was in place in June and July 2001; and that the policy reads as follows:

> Guidelines
>
> Associate Guidelines
> Associates may not engage in solicitation and/or distribution of literature during work time. This applies to activities on behalf of any cause or organization, with the exception of corporately sponsored charities.
> These charities are:
> Children's Miracle Network
> Corporate United Way Campaigns
>
> Solicitation and/or distribution of literature is not permitted at any time in selling or working areas.
>
> Associates are not prohibited from soliciting or distributing literature in the break room, provided all participating Associates are on a break or meal period.

Mallet further testified that a verbal coaching goes into a file other that the personnel file; that an

employee does not lose any wages or benefits based on a verbal coaching; that he gave a verbal coaching to Hall because three or four employees indicated that Hall asked them for their telephone number and asked them if they were interested in the Union; that he could only remember the names of two of the employees, namely Mary Spouse in soft lines and Margie Starcher, who is a cashier; that he told Hall what the policy was and she could not do it in the future; that he did not remember Hall asking for an employee witness to be present at that particular time but sometime after this when Hall was returning from a leave of absence she did ask for a former Wal-Mart employee, Graham, to be present and he denied her request; that Respondent's Exhibit 7 are, as here pertinent, his notes of his July 25, 2001 meeting with Hall (referred to in the notes as "Tippy") regarding solicitation[8]; that he did not tell Hall that she could not talk to anyone at all (a) during work time or (b) in working areas; that he told Hall that she could not solicit, detain others while they were working, and she had to stay in her work area when she was working; that shortly after their meeting Hall telephoned him and said that if it would make him happy, she would not talk to anyone; that he told Hall that she had to communicate as part of her job and she could not do her job unless she communicated; that he showed Hall the solicitation policy, Respondent's Exhibit 6; that he has told employees who were selling Avon products that they could not do that in the store; that he did not tell Hall that the 10 foot rule no longer applied to her; and that it was his understanding that Hall approached Starcher while Starcher was in a working area on working time.

On cross-examination Mallett testified that his notes, Respondent's Exhibit 7, contain, as here pertinent, the following entry for July 24, 2001:

> Garth (Gneiting) called:
> Wants me to talk to Tippy (Hall) about solicitation policy verbal coaching. Is faxing in new shadow Box info.

Mallett further testified on cross-examination that he did not talk directly with Sprouse about Hall soliciting her telephone number; that his assistant, McGuire, told him that Sprouse told her that Hall asked for her telephone number and wanted to discuss the right of an employee to have a witness sit in on a meeting with management; that he did not ask Hall if she did it; that Starcher told him directly that Hall asked for her telephone number if she was interested in joining the Union, and that Starcher told him that she gave Hall her telephone number but she really did not want to[9]; that when Hall spoke to her, Starcher was walking from the front of the store to the back of the store; that Hall did not request an employee witness when he spoke with her about the solicitation policy; that when Hall came to his office he already had the solicitation policy printed and he thought that he showed the policy to Hall; that he read the Associate Guideline portion of the policy, Respondent's Exhibit 6, to Hall; that it is his understanding of Wal-Mart's policy as to how managers should handle a request for a witness during an investigatory interview that the employee is given an option, namely either participate in the interview without a witness or the employee is not accorded the opportunity to tell his or her side of the story if he or she wants a witness there; that Wal-Mart's policy is that the manager should refuse to let the employee have a witness in such a situation; that he printed Respondent's Exhibit 6 off the Pipeline, which is available to every employee in every Wal-Mart store in the

---

[8] Mallett's notes indicate that he told Hall that this was a verbal warning and the next step would be a written.

[9] Mallett's notes, Respondent's Exhibit 7, read in part as follows:

> Also Margie Starcher told bill [sic, perhaps referring to Assistant Store Manager Bill Shriver] that Tippy [Hall] had approached her wanting her phone & Margie gave it to her but is somewhat intimidated by Tippy.

country; and that he told Gneiting that he was going to give Hall a verbal warning and Gneiting agreed during their July 24, 2001 conversation.

Also on July 24, 2001 Mallett summoned MacDonald to his office. MacDonald testified that Victor Duffy, who is a co-manager at the Aiken store, and McGuire were with Mallett; that Mallett told her that Wal-Mart has a no solicitation policy, he walked over to the computer and pulled out a sheet of paper and showed it to her; that Mallett told her that he had been watching her speaking with other employees, she had been warned before, this was a verbal warning, and she "was not allowed to speak on the clock in the store about anything, work related or non-work related" (transcript page 72); that Mallett told her that he had seen her speaking with Romona and she told him that she had to speak to her because they were setting shelves; that Mallett told her that he had seen her speaking with Robin and she told him that they were discussing beauty shops; that Mallett told her that he had seen her speaking with Young and she told him that they were discussing the fact that they both used the same oral surgeon; that Mallett told her that she was receiving a verbal warning because he had affidavits from other employees who were complaining that she had been asking for their phone numbers and had been visiting their homes; that prior to July 24, 2001 (a) employees freely spoke about non-work related topics while working in the presence of supervisors, and (b) she heard supervisors freely speaking with each other or with employees about non-work related topics while working; that to her knowledge there is no rule forbidding employees to telephone other employees; that hourly Wal-Mart employees are allowed to fraternize with other hourly Wal-Mart employees; that to her knowledge, Wal-Mart does not have any limits on the topics that hourly employees can discuss with each other on the sales floor; that she has never heard a manager tell an associate that they could not talk about a certain topic while they were working on the sales floor; that she never heard of an employee being disciplined for talking about non-work related topics while working on the sales floor; that almost every day she has spoken to managers on the sales floor while she was working about non-work related topics such as families and sports; and that she is a New England football fan and she has discussed professional football with Mallett, who is a New Orleans Saints fan, while she was working on the sales floor. On cross-examination MacDonald testified that Mallett told her that Wal-Mart had a solicitation policy and that only approved organizations like Children's Miracle Network or the United Way could solicit and no one else could solicit unless it was approved by Wal-Mart; that while Mallett held up a copy of the policy for her to see, she did not read it; that while she understood that Wal-Mart's solicitation policy meant that she could not solicit on behalf of the Union during working hours, she asked for the employee's phone number on her own time and the person whose phone number she asked for was not in the store but rather the employee was out sick; that while she was not working when she obtained the telephone numbers of employees identified only as Linda and Rosa, the employees who gave her the numbers were working at the time; that she had previously been spoken to about not being in her assigned area and visiting with other employees; and that Mallett told her that she could not talk and it was her understanding that she could not say anything while she was carrying out her duties to another employee, to a department manager, or to a customer. On cross-examination MacDonald testified that her diary indicated that she was told she could not talk to employees unless it was a break or lunch; and that the memorialization of the verbal coaching from Mallett about solicitation was taken out of her file after 1 year.

Mallett testified that he gave a verbal coaching to MacDonald with respect to solicitation because she had solicited phone numbers from a couple of employees; that he showed the solicitation policy to MacDonald; that he did not believe that MacDonald requested a witness at this meeting; that Respondent's Exhibit 8 are evaluations and written coachings that deal with the employees staying in their work area and being productive; and that, as here pertinent, his notes, Respondent's Exhibit 7, include the following entry dated July 25, 2001:

> Called Jan to bring Kathleen [MacDonald] to office. Discussed with Kathleen how Mgmt had noticed her standing, walking around store, talking to associate. Also told her a few associates had informed me that she had asked were they interested in the union or requested their phone #s. I explained our no solicitation policy to her. She said she understood. I told her this was a verbal warning & next step was written.

Mallett further testified that he explained to MacDonald that Wal-Mart does not allow solicitation "in work areas and when you're on the clock" (transcript page 373); that the solicitation policy is on the "Pipeline" and in the employee handbook; and that it was his understanding that MacDonald went into the bakery area and asked two bakery employees during their work time for their telephone numbers. On cross-examination Mallett testified that he read the solicitation policy to MacDonald as he had done with Hall; that with MacDonald it was not just solicitation but it was also a lack of productivity due in part to soliciting; that he did not talk to the employees in bakery but rather his assistant, McGuire, spoke with them; that McGuire told him that the two bakery employees were working when MacDonald came into their area and they did not want to discuss the Union with MacDonald; that he did not tell MacDonald who complained and he was not sure if he told MacDonald that the situation involved her being out of her work area; that he did not ask MacDonald for her side of the story; that he showed Respondent's Exhibit 6 to both Hall and MacDonald; that Wal-Mart does not have a rule against employees talking with each other about the Union while they are working as long as it does not interfere with their work or the employee does not leave their work area; that it is okay for one employee to give their telephone number to another employee while at work; that the solicitation policy prohibits selling Avon, Tupperware, Mary Kay, or Girl Scout products on the sales floor during work time; and that Respondent's Exhibit 8 does not include any documentation for an employee who (a) was just talking to another employee while they were still doing their work and they were still in their area, or (b) just asked for another employee's telephone number. On redirect Mallett testified that the solicitation policy is also on page 27 of the employee handbook, Respondent's Exhibit 9; and that an employee was informed of Wal-Mart's solicitation policy and she was told that she could not bring an Avon book into the store. On recross Mallett testified that none of the employees in Respondent's Exhibit 8 had a Performance Appraisal which referred to some kind of talking by an employees who was given a verbal coaching, the first step in the disciplinary procedure; that he was not sure if Respondent's Exhibit 9, which is dated 1998, is the employee handbook which applied to the Aiken store in 2001; and that the solicitation policy in Respondent's Exhibit 6, which was on the Pipeline, applied nationwide in the Summer of 2001 in that it indicates the it was revised February 1, 2001.

Williams testified that the employee handbook was revised on either January 1 or February 1, 2001; and that Respondent's Exhibit 11 is the 2001 version of the employee handbook. Respondent's Exhibit 11, as here pertinent, contains the following:

> Work time should be dedicated to serving our customers. For this reason, engaging in non-work related activities during work time is not permitted. Associates may not engage in solicitation or distribution of literature during work time. In addition, solicitation or distribution of literature is not permitted at any time in selling areas during the hours the store is open to the public. Distribution of literature is not permitted at any time in any work area.

Mallett testified that he gave the talking points dated July 24 and 26, 2001, both of which are found in Respondent's Exhibit 5. Williams testified that he believed that he prepared the talking points for July 26, 2001 but he was not certain if he prepared the talking points for July 24, 2001. On cross-examination Williams testified that when he prepared the talking points he

instructs the store manager to read them as written.

In late July 2001 Williams, Gneiting, Cannon, and Mallett were standing in the hallway when MacDonald passed by. MacDonald testified that they said "good morning" to her more than once and she did not reply; that Gneiting asked her why she did not respond and she told him that Mallett told her that she could not speak while she was on the clock whether or not it related to work; that Gneiting told her that Mallett was wrong and she had to speak as part of her job; that since then she has talked to other employees and to customers and she has not suffered any consequences; and that she did not recall speaking to Cannon or Williams about the no talking rule.

Cannon testified that on one occasion in June or July 2001 she spoke to MacDonald in the Aiken store and MacDonald said that she could not speak back, she had been instructed that she could not talk; that she told MacDonald that she could speak and that the 10 foot rule is supposed to be observed; and that MacDonald just kept going.

Gneiting testified that when he came back to the Aiken Store on July 30 and 31, 2001, he saw MacDonald, he said "hi" to her, MacDonald said that she could not talk to him, and he said "that's crazy." (transcript pages 233 and 234)

Mallett testified that Wal-Mart has a 10 foot rule which requires all employees to greet customers, members of management, supervisors and other employees when they come within the specified distance.

Williams testified that MacDonald told him that she could not talk to anyone and he told her that was not the case and she could talk to whoever she wanted to.

Torgerson testified that at the end of July 2001, 70 employees at the South Augusta, Georgia store received a wage adjustment after a wage compression review was conducted.

Analysis

Paragraph 9(a) of the complaint alleges that on June 12, 2001 Garth Gneiting unlawfully interrogate employees concerning their union sympathies and desires. General Counsel on brief contends that Gneiting's testimony is unworthy of belief because (a) Respondent failed to call Gant, who spied for the Respondent during the Union campaign, to corroborate Gneiting and therefore an adverse inference should be made, *Dino and Sons Realty Corp.*, 330 NLRB 680, 683 (2000), (b) MacDonald's testimony should be accorded a presumption of enhanced credibility because she is a current employee testifying against her own interests by testifying against her current employer, *Overnite Transportation Company,* 329 NLRB 990, 1022 (1999), and (c) Gneiting's testimony strains credulity in that it is incredible that the employee who initiated the Union campaign would seek to speak to a member of Respondent's Labor Relations Team who came to the store to nip in the bud the Union campaign she initiated. The Union on brief argues that Gneiting's version of his conversation with MacDonald on June 11, 2001 does not make sense and it is quite a coincidence that the first employee that Gneiting spoke to after getting to the store because of a rumor of a Union meeting was unbelievably the very employee who set up the Union meeting; that clearly Gneiting sought out MacDonald because her immediate supervisor, Batson, identified her as the source of the Union meeting rumor; and that Gneiting's mission was to quash the nascent organizing activity before it got out of hand by ascertaining MacDonald's concerns, reassuring her that they would be taken care of, and then remedying them. The Respondent on brief contends that this allegation fails on its face because the complaint refers to June 12, 2001 and not June 11, 2001; that MacDonald's diary

supports Gneiting's testimony that (a) the meeting occurred on June 11, 2001 and not June 12, 2001 as MacDonald and the complaint allege, and (b) he did not ask about union activity but only told MacDonald that there had been rumors of a Union meeting; that the logical conclusion is that no interrogation occurred; and that even if Gneiting asked a question about Union rumors, it does not constitute an unlawful interrogation since MacDonald initiated the meeting, the meeting occurred in a McDonald's restaurant, MacDonald volunteered what she considered to be the problems at the store, Gneiting told MacDonald what his job was and why he was at the store, and even if MacDonald's testimony is credited over her contemporaneous notes, the broad general question that MacDonald testified Gneiting asked was not coercive, and no further questions were asked.

MacDonald's diary does not unequivocally support Gneiting's testimony that the meeting occurred on June 11, 2001 and not June 12, 2001. As noted above, the entry refers to "TUES JUN 11, 2001" and the next preceding entry in the diary refers to "MON JUNE 11, 2001." June 11, 2001 was a Monday. Consequently, June 12, 2001 was a Tuesday. It appears that MacDonald made a mistake in designating the involved Tuesday entry June 11, 2001. The evidence in support of this allegation of the complaint is equivocal at best. MacDonald's notes do not support her testimony. MacDonald's concession, first made on cross-examination, that she, through employee Becky and possibly other employees, initiated the meeting casts doubt on MacDonald's direct testimony regarding this meeting. In view of this, in view of her notes, and in view of the fact that it has not been demonstrated with unequivocal evidence that Gneiting asked MacDonald about her union sympathies and desires, this allegation of the complaint will be dismissed.[10]

Paragraph 9(b) of the complaint alleges that on June 12, 2001 Garth Gneiting unlawfully solicited grievances and promised to remedy them in order to dissuade employees from engaging in union activity. General Counsel on brief contends that the general rule that solicitation of grievances during an organizational campaign violates the Act if accompanied by either an express or implied promise to remedy those grievances applies to Gneiting's solicitation of grievances from MacDonald in that Gneiting told MacDonald that the problems would not be settled overnight thus implying that her grievances would be remedied. The Union on brief makes this same argument. The Respondent on brief contends that MacDonald on her own initiative raised concerns that she had about store issues, Gneiting did not promise any particular solutions or remedies, and he only said that the new store manager had been at the store for a short time and he should be given a chance to try to get the store back on track.

As noted above, MacDonald's testimony about a portion of this conversation is not supported by her notes. The entry in her notes for Monday June 11, 2001 indicate that she was aware that a man named Garth (Gneiting) from Wal-Mart's home office was in the Aiken store, and he spoke to an employee described only as "Liz." Also as noted above, MacDonald testified that employees wanted her to speak with Gneiting and she told employee Becky that it was alright to ask Gneiting to meet with her, MacDonald. In my opinion the purpose of the meeting from MacDonald's and the employees' perspective was to tell Gneiting that the employees had problems. As noted above, MacDonald's notes read: "I spoke to Garth about our concerns. He said to give new manager Tim a chance and things would take a while to change." Again MacDonald's own notes do not specifically support MacDonald's testimony that Gneiting asked her what the issues were in the store. In my opinion Gneiting did not ask MacDonald what the

[10] Since MacDonald concedes that with her approval an employee or employees asked Gneiting to meet with her, Counsel for General Counsel's request for an adverse inference regarding Gant is denied.

problems or issues were in the store. Some of the employees and MacDonald wanted the meeting so that MacDonald could tell Gneiting, the home office man, what the problems were. It was not necessary for Gneiting to ask. Gneiting did not solicit grievances from MacDonald. And when MacDonald on her own initiative laid out the problems as she saw them, Gneiting did not explicitly promise to remedy them. Did he impliedly promise to remedy the problems described by MacDonald? MacDonald testified that Gneiting asked her to give Mallett a chance because he had just gotten to the store and these problems would not be solved overnight. As noted above, MacDonald's notes indicate that Gneiting said to give new manager Tim a chance and things would take a while to change. I do not believe that either version of what Gneiting allegedly said to MacDonald could reasonably be construed to mean that the problems MacDonald described were indeed going to be remedied because she brought them up. If Gneiting gave either one of these responses, he was doing nothing more than conceding the obvious, namely there were problems during the tenure of the prior store manager, the Respondent was aware of the problems, the prior store manager was removed, a new store manager was just brought in, and he should be given a chance. There were no promises made to MacDonald, explicit or implied. In my opinion it has not been demonstrated that the Respondent violated the Act as alleged in this portion of paragraph 9 (b) of the complaint.

Also paragraph 9(b) of the complaint alleges that on June 26, 2001 Gwen Cannon unlawfully solicited grievances and promised to remedy them in order to dissuade employees from engaging in union activity. General Counsel on brief contends that Cannon did not refute Graham's testimony; that Cannon testified that she often asks employees how things are going; and that Cannon ended her testimony with 'I really don't remember anything.' The Union on brief argues that Cannon's testimony about this conversation should be discounted since she testified that she did not remember the specifics of it, and she testified that she really did not remember anything. The Respondent on brief contends that one of the concerns at the Aiken store was that there had been shortages in the cash office; that to gain insight into those issues, Cannon went to the cash office and talked to several employees, including Graham; that Cannon discussed with Graham policies and procedures in the case office; that Cannon did not make any promises to fix any concerns that Graham had; and that Cannon had no information that Graham was involved in any union organizing efforts.

For the reasons specified by Counsel for General Counsel and the Charging Party, Cannon was not a reliable witness. Graham's testimony about her conversation with Cannon is credited. Cannon was not at the Aiken store to address shortages in the cash office. Cannon was at the Aiken store in June 2001 as a part of Wal-Mart's Bentonville team which was sent to Aiken to make sure that the Union did not succeed in organizing Wal-Mart's Aiken employees. As noted above, Cannon asked Graham what were the problems in the office and Cannon promised that she would get back to the employees the next day and let them know what she could take care of. Cannon did not get back with the employees the next day. Solicitation of grievances during an organizational campaign violates the Act if accompanied by either an express or implied promise to remedy those grievances. With respect to Cannon's conversation with Graham, there was no express or implied promise to remedy grievances. According to Graham's testimony Cannon said that she would get back to them the next day. Cannon did not get back to them the next day so Cannon never really let Graham know what Cannon could take care of. Cannon wanted to know what the problems were and this curiosity was occasioned by the Union organizing drive. But the solicitation of grievances was not accompanied by an explicit or implied promise to remedy the grievances. While it has been held that the solicitation of grievances during a union campaign constitutes an implied promise to remedy the grievance, the fact that Cannon told the employees that she would get back to them the next day and then did not rebuts any inference and demonstrates that there was no explicit or implied promise to remedy the grievances. Accordingly, the Respondent did not violate the Act as alleged in this

portion of paragraph 9(b) of the complaint.

And finally, paragraph 9(b) of the complaint alleges that on June 21, 2001 Jim Torgerson unlawfully solicited grievances and promised to remedy them in order to dissuade employees from engaging in union activity. General Counsel on brief contends that on June 21, 2001 Torgerson told assembled employees that he and the local management team would be leaving the store for a few hours, and that managers from other stores would be present to address any problems they might have; that at the June 21, 2001 meeting Torgerson instituted a method by which he afforded Aiken store employees access to Wal-Mart managers in order to present their grievances in the absence of their local store and district manager; and that the Respondent presented no evidence indicating that it had ever before afforded employees at the Aiken store, or for that matter employees at any other of its stores, an opportunity to air their grievances to outside management officials, as Torgerson had invited them to do at the June 21, 2001 meeting. The Respondent on brief argues that the managers from other stores were there to assist with any operational problems; that the statement even if said, is nothing but a simple procedural note to employees about what they should do if a problem arose in the store while the normal managers were absent; that it is not alleged that there was a promise to remedy any grievances; and that the credible evidence does not support a finding that Torgerson solicited grievances or promised remedies to deter union activity.

This allegation regarding Torgerson is without merit. It is obvious what such a statement would mean. It could not reasonably be construed as an unlawful solicitation of grievances. The replacement managers were running the store in the absence of the regular managers. Torgerson was telling the employees that If there was a problem with the operation of the store while the temporary, replacement managers were running it, they should be told. Accordingly, the Respondent did not violate the Act as alleged in this portion of paragraph 9(b) of the complaint.

Paragraph 9(c) of the complaint alleges that on June 22, 2001 Kirk Williams unlawfully informed Respondent's employees that it would be futile to select the Union as their exclusive collective bargaining representative. General Counsel on brief contends that Williams told the employees that the Union would promise them better wages and benefits, but ultimately, even if the employees selected the Union to represent them, Wal-Mart would have the final say; that an employer unlawfully threatened its employees that their organizational efforts are futile whenever it asserts that it will not bargain with the union after its employees have selected it to represent them, *Sea Ray Boats, Inc.*, 336 NLRB 779 (2001); that in the context of the June 22, 2001 meeting, employees would reasonably interpret Williams's statement that Wal-Mart would have the final say as containing such a threat; that the assembled employees would reasonably understand that the final 'say' would be a resounding 'no'; and that there can be no doubt that Williams implied to the employees that Wal-Mart would not bargain with the Union. The Respondent on brief contends that Williams did not indicate that choosing the Union as a representative would be futile and he did not say that Wal-Mart would have the final say on any issue; and that Williams testified that if someone asked 'doesn't Wal-Mart have the final say,' he would have responded as follows:

> … in contract negotiations Wal-Mart would have to agree to a Contract and if Wal-Mart didn't agree, then the Union would have several options, but the Company has the right to bargain and it has the right to bargain on its own behalf, and that Wal-Mart would have to agree to any Contract that would be negotiated. [Transcript page 477]

MacDonald's uncorroborated testimony that Williams told the employees that Wal-Mart would have the "final say" is not sufficient in my opinion to warrant a finding that Williams in fact

made this statement. As noted above, MacDonald's notes indicate that Williams said "… the Union promises better wages and benefits but ultimately Wal-Mart has the final decision." Even if Williams made the statement attributed to him in MacDonald's notes, contrary to the assertion of Counsel for General Counsel on brief, the statement is not the equivalent of saying that Wal-Mart would not bargain with the Union. A more reasonable interpretation of these words in the involved context is that given by Williams as quoted in the next preceding paragraph. Wages and benefits[11]come from Wal-Mart. Ultimately it would have to agree as to what the wages and benefits would be before the employees receive them. The Union would not unilaterally decide wages and benefits. The Respondent did not violate the Act as alleged in paragraph 9(c) of the complaint.

Paragraph 9(d) of the complaint alleges that on June 27 or 28, 2001 Tim Mallett unlawfully promised to improve employee wages to discourage union activity. General Counsel on brief contends that corroborating Graham with their silence, none of the Respondent's witnesses testified that Respondent made any announcement concerning a wage review or the contemplation of a general wage increase prior to the June 27, 2001 meeting where Mallett allegedly told the assembled employees that the employees would be brought up to standards regarding raises; that the Respondent's witnesses failed to rebut Graham's testimony in that Mallett's testimony consisted of two "no , sir[s]" and two "no[s]," in response to leading questions concerning whether he or anyone else in management had ever discussed "wage increases as a response to Union activity" or promised that wage increases would occur; that Williams responded "no" to a leading question as to whether he had ever heard Mallett promise a wage increase of any sort; that since Shriver, who was present at the June 27, 2001 employee meeting and whom Mallett was going to charge with the duty of reviewing employee wages, was not called by the Respondent to testify and the Respondent provided no reason for failing to call him, an adverse inference should be taken; that while Mallett and Williams did not testify at all about the June 27, 2001 meeting, Graham's testimony was detailed and precise; that Mallett's promise that he would straighten things out by directing Shriver to review wages to "bring everyone up to standard" violated Section 8(a)(1) of the Act in that the Board considers such promises to be extremely coercive; that the Board has held that to be unlawful, a promise of benefit made during a union campaign need not be specific as to the time of implementation and need not be expressly conditioned on abandonment of union support because employees are unlikely to miss the inference that the source of benefits presently conferred is also the source from which future benefits must flow, and the employees understand that the benefits might cease to flow it they choose unionization, *Rainbow News 12*, 316 NLRB 52, 63 (1995); and that the day after the June 27, 2001 meeting the Respondent did increase the wages of 90 employees in violation of the Act. The Respondent on brief argues that Mallett never talked about wage increases as a response to union activity nor did he ever promise any wage increases would occur; that no other employee corroborated Graham; that the talking papers which were introduced into evidence do not support Graham's allegation; that a review of wages had already begun before any Union activity occurred; that it would not have been unlawful for Mallett to discuss the results of this pre-existing review with employees or to announce that the previously commenced review was going to result in wage increases for some, but by no means all, of the employees in the store; and that such an amendment is not a "promise of benefits," and would not have violated the Act.

As pointed out by Counsel for General Counsel, Mallett and Williams did not specifically rebut Graham's detailed testimony regarding what Mallett told assembled employees about

[11] If the union has a health and welfare program, it is funded by the employer.

raises before the wage adjustment went into effect.[12] And the Respondent did not call Assistant Manager Shriver to testify about this meeting. Counsel for General Counsel's request for an adverse inference is granted. Graham's testimony is credited. The Respondent argues that it would not have been unlawful for Mallett to discuss the results of this pre-existing review with employees or to announce that the previously commenced review was going to result in wage increases for some of the employees in the store. As concluded below, the wage adjustment violated the law. Contrary to the assertion of the Respondent, it was not a preexisting review. The review or wage compression report, according to the testimony of Cannon, commenced after she and other members of the Bentonville team arrived at the Aiken store, which was after they, in addition to Torgerson and Mallett, became aware of the union organizing drive. Mallett expressly promised that everybody would be brought up to the standards on raises.[13] The Respondent violated the Act as alleged in paragraph 9(d) of the complaint.

Paragraph 9(e) of the complaint alleges that on June 29, 2001 Kirk Williams unlawfully threatened the Respondent's employees with a reduction in their profit sharing because they had engaged in union activities or had cooperated with the Board. General Counsel on brief contends that William's remarks were calculated to, and reasonably did, threaten and coerce employees who had reported unfair labor practices to the Union and to the Board by inciting enmity against them by other employees who, according to Williams, would lose part of their profit sharing to attorney fees; that while MacDonald's notes, Respondent's Exhibit 1, reflect that she told Williams that she was not planning to attend the meeting, the notes do not conclusively demonstrate that she failed to attend the meeting on June 29, 2001, and the very next entry in MacDonald's notes states "The meeting is over"[14]; that Williams' statement is not privileged under Section 8(c) of the Act in that Williams explained no reason why Respondent would have to hire "expensive" attorneys; and that the assertion that Williams merely answered a question from an employee must be rejected as untrue. The Union on brief argues that while Williams speculated that MacDonald did not attend the June 29, 2001 meeting because she told him that she was not going to attend, neither Williams nor Mallett specifically denied that MacDonald attended this meeting; and that Williams never testified that he remembered who attended the meeting or that he consulted any document like a sign in sheet. The Respondent on brief contends that the only witness presented by Counsel for General Counsel to support this allegation was MacDonald, whose testimony on this matter is entirely unreliable; that MacDonald admitted on cross-examination that she was not at the meeting on June 29, 2001; that her claim that she was at the meeting some other day is simply implausible given the lack of a diary entry showing such a meeting; that even assuming that MacDonald had witnessed the meeting, nothing was said that violated the Act; that in response to a question from an employee, Williams gave entirely factual information about corporate expenses and profit

---

[12] Since it was not shown that Torgerson or Cannon attended this meeting, their testimony about what Mallett did not say at a meeting that they did not attend carries no weight.

[13] The fact that Torgerson asked MacDonald not to discuss her raise with other employees and the fact that employees were told about their wages on an individual basis has been considered. This, in my opinion, does not reduce the likelihood that Mallett held out the expectation to all employees present that their wages would be brought up to standards. That Respondent did not want to announce the fact that only certain employees received the raise serves only to demonstrate that the Respondent did not want to extinguish the expectation of the other employees.

[14] Not only do MacDonald's notes corroborate Williams, but there is no entry with respect to what occurred at the meeting if she did attend. She did take extensive notes of at least one other employee meeting. The entry that "Meeting is over" could mean nothing more then she noticed other employees returning to the sales floor at 9:57 a.m.

sharing; that there is no evidence that the statements were posed as a threat or could reasonably be interpreted as threatening; and that truthful messages of potential consequences of unionization do not violate the Act, *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995).

I find perplexing Counsel for General Counsel' contention that Williams' statement is not privileged under Section 8(c) of the Act in that Williams explained no reason why Respondent would have to hire "expensive" attorneys. Does this mean that if Williams said that Wal-Mart was hiring inexpensive attorneys, the statement would have been privileged? The message was not that the expense was an expense the Respondent could not afford. If one is put in the position of having to retain an attorney, would not this mean that they were going to have an expense that they would not otherwise have? If Williams used the word expensive, could it be that Williams was saying that having to hire an attorney was going to be expensive? For the above-described reasons given by the Respondent on brief, I do not believe that Respondent violated the Act as alleged in paragraph 9(e) of the complaint.[15]

Paragraph 9(f) of the complaint alleges that on July 2, 2001 Tim Mallett and Jim Torgerson ordered the Respondent's employees to report the union activity of fellow employees to management. General Counsel on brief contends that Torgerson and Mallett make it clear to employees that they should report all instances of Union organizers distributing literature outside the store; that knowing that Mallett and Torgerson could go to the parking lot at shift change, just as easily as the employees could, the assembled employees clearly understood that (a) they were being asked to report whom, if anyone, Union organizers had spoken to, and (b) an informer might report him or her to management if he or she dared speak to a Union organizer; and that Torgerson and Mallett threatened and coerced employees in violation of the Act, *Aldworth Co., Inc.*, 338 NLRB No. 22 (2002). The Respondent on brief contends that the only person who testified that the alleged statement was made, MacDonald, was not even present according to her diary; that to believe that MacDonald made entries for the other things she did that day, as described above, but did not make an entry for the involved meeting and what was said at that meeting is not reasonable.

Once again MacDonald's notes do not corroborate her testimony. In view of this, one would think that Counsel for General Counsel or the Charging Party would have called at least one other witness to testify about this meeting. According to MacDonald's testimony, all of the first shift attended this meeting. Yet no one else testified to corroborate MacDonald's testimony. Torgerson concedes that he told employees that there was a possibility that union representatives may come in the Aiken store. But both he and Mallett deny instructing employees to report when they saw union organizers on the premises. The above-described talking points about unwanted phone calls and visits at employee homes by union organizers do not order employees to report the union activity of fellow employees to management, and they do not invite employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitations, implying that such conduct will be punished. *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998) In my opinion Counsel for General Counsel

[15] This is not a situation like that in *Pilot Freight Carriers, Inc.*, 223 NLRB 286, note 1 (1976) where the employer said that he had spent $10,000 in attorney's fees to counter the union that otherwise would have gone to the employees. There the Board found that the employer implied that further union activities would deprive the employees of pay they might otherwise receive. Here, since a charge had been filed with the Board, Wal-Mart surely should be allowed to defend itself as best it can. This would be a necessary expense, it obviously would be carried on Respondent's books as an expense, and it would have whatever ramifications an expense to the Company would normally have.

has not met his burden of proof to show Mallett and Torgerson ordered the Respondent's employees to report the union activity of fellow employees to management. It has not been shown that the Respondent violated that Act as alleged in paragraph 9(f) of the complaint.

Paragraph 9(g) of the complaint alleges that on July 24, 2001 Tim Mallett denied an employee's request for an employee witness during an investigative interview. General Counsel on brief contends that Hall asking Co-Manager McGuire 'what have I done now' demonstrates her fear that discipline might ensue from a meeting with Mallett; that Hall's testimony is entitled to enhanced credibility due to her status as a current employee; that Wal-Mart neither called McGuire to testify nor provided an explanation for its failure to do so and this should result in an adverse inference; that the Board in *Epilepsy Foundation of Northeastern Ohio*, 331 NLRB 676 (2000) extended *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) rights to un-represented employees; that Hall expected that discipline might ensue from the meeting, and Mallett indeed issued discipline to Hall during the meeting; and that Respondent violated Section 8(a)(1) of the Act in denying Hall's request for a witness. The Respondent on brief argues that Hall took notes about events during that time period but she never shared those notes with Counsel for General Counsel or the Union's attorney and she did not produce them to support her testimony; that Hall admitted that Mallett never said he was conducting any sort of investigation; that prior to the meeting Hall did not ask for an employee witness; that Mallett took notes of the conversation he had with Hall regarding solicitation and his notes have no reference to Hall requesting an employee witness; and that even if Hall had requested someone to be present, an employee has no right to a witness under *Weingarten* where management meets with an employee simply to convey previously decided discipline and does not question or interrogate the employee during the meeting. *Becker Group, Inc.,* 329 NLRB 103 (1999), *LIR-USA Mfg. Co.,* 306 NLRB 298 (1992), and *Brunswick Electric Corp.,* 308 NLRB 361(1992)

As noted above, Mallett testified that that it is his understanding of Wal-Mart's policy as to how managers should handle a request for a witness during an investigatory interview that the employee is given an option, namely, either participate in the interview without a witness or the employee is not accorded the opportunity to tell his or her side of the story if he or she wants a witness there; and that Wal-Mart's policy is that the manager should refuse to let the employee have a witness in such a situation. Here, in my opinion, Hall asked for a witness before the meeting at which she was disciplined over the solicitation policy, and Mallett denied the request. McGuire was not called to corroborate Mallett. Counsel for General Counsel's request for an adverse inference is granted. Mallett would have been acting in accord with Wal-Mart's policy if it had been an investigatory interview. But here it was not an investigatory interview and there was no violation of the Act. In *Baton Rouge Water Works Company*, 246 NLRB 995, 997 (1979), the Board held as follows:

> as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to … [have a witness present] exists under *Weingarten* when the employer meets with the employee simply to inform him [or her] of, or impose, that previously determined discipline.

Mallett and Gneiting agreed that Hall would be given a verbal warning before Mallett met with Hall. The meeting was called to inform Hall of previously determined disciplinary action. There is no evidence of record that Mallett informed Hall of the disciplinary action and then sought facts and evidence in support of that action. The Respondent did not violate the Act as alleged in paragraph 9(g) of the complaint.

Paragraph 9(h) of the complaint alleges that on July 23 and 24, 2001 Tim Mallett

promulgated and enforced an unlawful no-talking rule to discourage union activity. General Counsel on brief contends that Mallet told Hall that she was forbidden to talk in the store on the sales floor whether she was on or off the clock, and if she did not follow this dictate, he would write her up for anything he saw fit; that Mallett forbade MacDonald to speak about any subject, whether work related or not, any time while on the clock and in the store; that Mallett's notes contradict parts of his testimony in that while he testified that he spoke directly with Starcher, his notes, Respondent's Exhibit 7, indicate "Also Margie Starcher told bill [sic] that Tippy [Hall] had approached her wanting her phone #. Margie gave it to her but is somewhat intimidated by Tippy"; that Mallett's testimony is also not corroborated by Sprouse, Starcher, McGuire, Duffy, and the Bakery Manager; that Wal-Mart failed to present any explanation for its failure to call these individuals to testify at the trial herein and this warrants an adverse inference; that MacDonald's contemporaneous statements to Cannon, Gneiting and Williams corroborate her testimony, as does the fact that Mallett similarly prohibited Hall to speak; that Respondent allows its employees to (a) speak to each other while they are working, provided the conversation does not interfere with their duties, and is not vulgar or disrespectful, and (b) ask for or give their telephone number to customers or to each other, and (c) fraternize; and that an employer cannot utilize a solicitation rule to ban conversation about a Union if it does not prohibit conversations about non-work related matters during working time. *Teledyne Advanced Materials,* 332 NLRB 539 (2000) The Union on brief argues that soliciting only encompasses employees asking fellow employees to join the Union and begin paying dues or to sign authorization cards; that solicitation includes a financial aspect that simple advocacy or talking does not; that here Wal-Mart applied its solicitation policy to prohibit non-solicitation talk about the Union and union meetings, and employees' requests for phone numbers, while permitting employees to talk about all other topics on the sales floor during work time; that Wal-Mart disparately applied its policy to prohibit working employees from talking about the Union on the sales floor and asking working employees for their telephone numbers; and that Wal-Mart cannot apply its solicitation policy to prohibit Hall and MacDonald from engaging in protected activity because it upsets of bothers other employees. The Respondent on brief contends that the credible evidence does not support the notion that Mallett issued a 'no talking' rule to either MacDonald or Hall; that Mallett met with Hall and MacDonald to advise them of Wal-Mart's solicitation policy and tell them that they were not to engage in further solicitation in working areas on working time; that MacDonald and Hall clearly took that simple concept to an extreme and interpreted it to mean that they were not allowed to talk to anyone at any time; and that it strains credibility to think that Mallett in his capacity as Store Manager would put such severe restrictions on an employee's ability to successfully perform her duties.

The problem with Mallett's approach during his meetings with MacDonald and Hall is that these two employees were not soliciting in the first place. To ask an employee for their telephone number to discuss the Union, if the employee is interested, after work is not soliciting by any stretch of the imagination.[16] Wal-Mart does not have a rule prohibiting one employee from asking another employee for their telephone number. So it is easy to understand in the

[16] As pointed out by Judge Dyer, and affirmed by the Board, in *W. W. Grainger, Inc., 229* NLRB 161, 166 (1977):

> It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad. 'Solicitation' for a union usually means asking someone to join the union by signing his name to an authorization card in the same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization or having the employee sign a chance book for such a cause or in the commercial context asking an employee to buy a product or exhibiting the product for him from a book or showing the product.

confusion created by Mallett how MacDonald and Hall would interpret what Mallet was trying to convey as a prohibition against talking on the sales floor. Wal-Mart with its own Labor Department and legal staff could not get the solicitation policy right; what was published on Wal-Mart's intranet Pipeline at the time and shown to MacDonald and Hall was facially unlawful. Mallett's telling MacDonald and Hall that what they did was prohibited solicitation is neither correct in fact nor as a matter of law. Mallett was citing an unlawful policy and he was making the facts out to be something other then what they were. It is no wonder why the two employees were confused and choose to take the safest approach in the circumstances, and not talk to anyone on the sales floor. The testimony of Hall and MacDonald is credited with respect to what Mallett told them. It was their perception that Mallett told them that they could not talk to employees on the sales floor. Mallett's testimony on this matter is not credited. None of the management individuals who witnessed Mallett's statements to Hall and MacDonald were called to testify at the trial herein, and their absence was not explained by the Respondent. Counsel for General Counsel's request for an adverse inference is granted. The Respondent and Mallett created the situation. The Respondent must suffer the consequences. The Respondent violated the Act as alleged in paragraph 9(h) of the complaint.

As set forth in note 1 supra, at the trial herein Counsel for General Counsel's motion to amend the complaint to include paragraph 9(i) was granted. On page 31 of his brief Counsel for General Counsel indicates that in view of the aforementioned July 2, 2003 approval of the informal settlement in Case No. 11-CA-19902, he does not request any further remedy for the violation alleged in paragraph 9(i) of the complaint. Consequently, it will not be treated further herein.

Paragraph 10 of the complaint alleges that on July 23 and 24, 2001 the Respondent issued verbal warnings to Kathleen MacDonald and Barbara Hall, respectively. General Counsel on brief contends that conversing is one thing and soliciting is quite a different matter; that Gneiting admitted that employees may converse about the pro's and con's of unionization while working and the Respondent has no prohibition against asking or providing telephone numbers from or to employees; that Respondent disciplined Hall and MacDonald for engaging in conversation not solicitation; that the Board has long held that an employer may not lawfully maintain a rule prohibiting employees from bothering or harassing other employees if that may be applied to union or other protected concerted activity, *ACTIV Industries*, 277 NLRB 834, 839 (1985); that Respondent failed to present any substantive evidence regarding the conversations that Hall and MacDonald engaged in with their fellow employees, and for which Respondent disciplined them; that Respondent's attorney, after Counsel for General Counsel objected to the hearsay nature of the testimony, indicated that Mallett's testimony regarding what he was told by others about what occurred between Hall and MacDonald, on the one hand, and the employees they spoke with, on the other hand, was not offered for the truth of the matter asserted[17]; that the Respondent has not met its burden to prove that MacDonald and Hall committed alleged violations of the solicitation rule while on work time or in working areas because there is no substantive record evidence concerning their conversations with fellow employees that are at issue herein; that Respondent did not prove that it disciplined Hall and MacDonald pursuant to a valid solicitation policy in that Wal-Mart's solicitation policy was facially unlawful because it prohibited soliciting at any time in selling or working areas; that sales floors are limited to "areas where sales are being made" and which affect the "passage and safety of customers," *Marshall Field & Company*, 98 NLRB 88 (1952); that a no-solicitation rule that

[17] The statements were admitted to serve solely as an explanation by Mallett for his actions in issuing the disciplines to Hall and MacDonald. They were not offered and they were not admitted for the truth of the matter asserted.

forbids solicitation in work areas is unlawful, *McBride's of Naylor Road*, 229 NLRB 795, 795-796 (1977); and that Wal-Mart's policy unlawfully prohibits non-work time solicitation in non-selling work areas. The Union on brief argues that the solicitation policy Wal-Mart used to discipline MacDonald and Hall was facially overboard because it prohibited non-work time solicitation in non-sales work areas and in sales areas when stores are closed; that here Wal-Mart maintained an overly broad solicitation policy that its Home Office Labor Relations Managers directed be used to unlawfully discipline two Union supporters for talking about the Union, Union meetings, and requesting fellow employees' telephone numbers; that Wal-Mart unlawfully applied its solicitation policy to prohibit employees from talking about organizing on the sales floor during work time; that an employer acts unlawfully when it forbids employees to discuss unionization while working, but they are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' organizing activities, *Teledyne Advanced Materials*, 332 NLRB 539 (2000); that Wal-Mart disparately applied its policy to prohibit working employees from talking about the Union on the sales floor and asking working employees for their telephone numbers; and that employers may not lawfully maintain policies or practices restricting protected activity that upsets or bothers other employees. The Respondent on brief contends that Mallett gave Hall the verbal coaching because three or four employees complained that Hall had asked them for their telephone numbers and asked them whether they were interested in attending an upcoming Union meeting; that all of these "reported solicitations" (Respondent's brief, page 54) took place in working areas and on working time; that Mallett spoke with MacDonald after two employees in the Bakery area reported that MacDonald was soliciting their phone numbers on working time to gauge their interest in coming to a Union meeting, and it made them uncomfortable; that retail establishments may prohibit solicitations in the selling areas of a retail store even when employees are on their own time, *J. C. Penny Co.,* 266 NLRB 1223, 1224 (1983); that Mallett had a reasonably-held good faith belief that they had engaged in conduct in violation of Wal-Mart's solicitation policy; that even if the solicitation policy posted on Wal-Mart's Pipeline during the involved time was facially unlawful, that finding would not render the verbal coachings to Hall and MacDonald unlawful; and that there is no evidence that Mallett applied the policy to Hall and MacDonald in a disparate or unlawful manner.

None of the employees who allegedly complained about Hall and MacDonald asking them for their telephone numbers was called by the Respondent to testify at the trial herein. If they had been called as witnesses, then the members of management who allegedly fielded the complaints could have been called to corroborate the testimony of the employees about complaining to management. Since they would have been corroborating testimony of record, the managers' testimony would not have been hearsay. Mallett asked MacDonald about her conversations with Romona, Robin, and Young. If the employees who allegedly complained were instead asked by management about their conversations with Hall and MacDonald, and to protect themselves said that they did not give their telephone numbers or they gave their telephone numbers to Hall and MacDonald but they did not want to, this would place the conversations in a light different than that described by Mallett. Mallett testified that he spoke with Starcher but Mallett's notes indicate that Starcher spoke with "bill." Perhaps both spoke with Starcher. Bill was not called to testify. All of Mallet's testimony regarding employee complaints was specifically not offered for the truth of the matter asserted. The statements were admitted to serve solely as an explanation by Mallett for his actions in issuing the disciplines to Hall and MacDonald. They were not offered and they were not admitted for the truth of the matter asserted. Consequently, Counsel for General Counsel is correct. Wal-Mart failed to present any substantive evidence from the employees who allegedly complained regarding the conversations that Hall and MacDonald engaged in with them, and for which Respondent asserts it disciplined them; the Respondent has not met its burden to prove that MacDonald and Hall committed alleged violations of the solicitation rule while on work time in selling areas

because there is no substantive record evidence concerning their conversations with fellow employees that are at issue herein. Additionally, even if relying solely on the testimony of Hall and MacDonald, it was concluded that Hall and MacDonald engaged in the conversations alleged, for the reasons given above, the conversations did not involve solicitations. Consequently, the conversations would not fall under Wal-Mart's Pipeline rule, which - for the above-described reasons specified by Counsel for General Counsel on brief - on its face is unlawful. Mallett was not acting in good faith. Either at the behest of or with the explicit approval of Wal-Mart's home office he was enforcing a policy that Respondent knew was problematic. Additionally, Hall and MacDonald were treated disparately. Employees were allowed to discuss non-work related topics while they were working either on the sales floor or in a work area. While they were doing the same thing, Hall and MacDonald were disciplined because the non-work related topic they spoke about was a Union meeting. Additionally, with MacDonald Mallett brought up the fact that she visited employees' homes. The Respondent does not have a rule prohibiting such conduct. The Respondent violated the Act as alleged in paragraph 10 of the complaint.

Paragraph 11 of the complaint alleges that beginning on June 28, 2001, the Respondent increased the wages of Kathleen MacDonald and approximately 89 other employees. General Counsel on brief contends that Respondent first announced to employees its intention to grant a wage increase to a number of its employees during the meeting on June 27, 2001; that Respondent stipulated that it granted wage increases to MacDonald and 89 other Aiken employees on June 28, 2001; that the Board carefully scrutinizes the announcement and granting of wage increases after the advent of union activity; that the Board places the burden on the employer to prove that the announcement and/or grant of a wage increase is legally permissible by demonstrating that it was following its past practice regarding wage increases or that the wage increases were planned and settled upon before the advent of union activity, *Capitol EMI Music*, 311 NLRB 997, 1012 (1993); that Respondent failed to present any evidence that it had ever granted a wage compression salary adjustment at its Aiken store; that the testimony of its own witnesses establishes that the decision to grant wage increases 'was settled upon' well after the advent of union activity at the Aiken store; that while Torgerson claimed without any documentary support that he had contemporaneously granted wage compression wage increases at two other stores in his district, namely Orangeburg and South Augusta, Cannon contradicted Torgerson's undocumented assertion of his past practice of granting wage compression wage increases in that ultimately she could only remember one other instance where the Respondent granted a general wage increase as a result of a wage compression survey and that store was in Virginia; that Cannon did not testify as to whether the employees at that Virginia store had engaged in any union activity; that the wage compression report was created after Wal-Mart learned about the union campaign at the Aiken store; that Torgerson admitted that he received the wage compression report for the Aiken store after the Respondent had learned of the advent of union activity and had dispatched the Labor Relations Team to the Aiken store; that Cannon admitted that she requested the wage compression report in June, 'shortly … after we got there'; that none of Respondent's key players in the decision to grant wage increases to 90 employees knew how or why or who decided that all 90 employees would or should be granted a 5% across the board wage increase; that Torgerson had no idea as to who decided to grant the 90 employees a 5% wage increase rather than a 4% wage increase and he was unsure whether the wage increase was 4% or 5%; that Cannon provided no reason as to why all 90 employees were treated as if they had received maximum evaluations for every year that they had worked; that Cannon admitted that although some of the 90 employees might have received less than a 5% increase in the prior years because they had performed unsatisfactorily, Respondent granted to all 90 employees the maximum possible wage increase of 5%; that Cannon testified that Mallett and Torgerson computed and approved the percentage amount of the increase to be granted to employees on June 28, 2001; that

neither Mallett nor Torgerson testified that they computed and approved the percentage amount of the increase to be granted to employees on June 28, 2001; that not one of the Respondent's witnesses even claimed to know, with respect to the amount of the wage increase, who made the decision or why; that Cannon admitted that the person who ultimately approved the wage increase was aware of the ongoing union campaign; and that the Respondent has not carried its burden of persuasion. The Respondent on brief argues that the wage increase in this case was not given in the context of an election petition and therefore there is no presumption that the wage increase is unlawful[18]; that there is no causal connection between the wage increase and an effort to thwart union activity; that the scope of the increase hardly supports a motivation to squelch Union organizing; that there is no evidence that increases were given based on an employee's involvement or non-involvement in possible Union activity; that all of the testimony is that the wage increases were given because of the compression that had occurred and this is what employees were told; that the increase was similar to that given just months before in another store that Torgerson supervised, the Orangeburg store; and that there had been no reports of Union activity in that store or in the South Augusta store, which received a wage adjustment a short time after the Aiken store.

As pointed out in *Capitol EMI Music*, supra, to grant benefits to employees in order to dissuade them from supporting a union violates the Act, and the granting of wage increases is legally permissible if it can be shown that an employer was following its past practice regarding such increases or that the increases were planned and settled before the advent of union activity. Here I do not believe that the Respondent has demonstrated that it was following a past practice regarding granting wage increases at its Aiken store based on a wage compression report. Indeed the Respondent has not shown that it has ever granted a wage increase at the Aiken store based on a wage compression report. At least one of the Respondent's witnesses did testify about a prior wage increase at Wal-Mart's Orangeburg store but no documentation was introduced explaining the specifics of the raise. None of the Respondent's witnesses could fully explain who made the notations on the documentation that was introduced to explain the specifics of the June 28, 2001 wage increase at the Aiken store, the wage compression report, and who actually decided the amount of the raise to be granted. It is clear, however, that Cannon did not ask for the wage compression report until after the Respondent became aware of the union organizing drive and the Respondent sent its Labor Relations Team, including Cannon, to the Aiken store. In other words, only after a member of the Labor Relations Team was told by chief union adherent MacDonald that pay was an issue, were concrete steps taken – working up a wage compression report – to reach a determination with respect to any pay increase. It has not been shown that the Respondent began in earnest its effort to determine if employees should be granted a wage increase until after Wal-Mart was aware of the union organizing drive and MacDonald told Gneiting that pay was an issue. Cannon conceded that the when the person who approved the raises acted he was aware of the union organizing drive at the Aiken store. Consequently, Wal-Mart has not shown that it was following a past practice or that the increases were planned and settled upon before the advent of the union activity. The Respondent violated the Act as alleged in paragraph 11 of the complaint.

[18] After this assertion at page 61, line 6 of its brief, the Respondent indicates "[cite]." However, no citation was provided.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL.-CIO, CLC is a labor organization withing the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on or about June 27, 2001 by promising to improve employee wages to discourage union activity.

4. Respondent violated Section 8(a)(1) of the Act on or about July 24, 2001 by promulgating and enforcing an unlawful no-talking rule to discourage union activity.

5. Respondent violated Section 8(a)(3) and (1) of the Act by issuing verbal warnings to Kathleen MacDonald and Barbara Hall on or about July 24, 2001.

6. Respondent violated Section 8(a)(3) and (1) of the Act by increasing the wages of Kathleen MacDonald and 89 other employees on or about June 28, 2001.

7. Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Wal-Mart Stores, Inc., of Bentonville, Arkansas, and, as here pertinent, Aiken, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising to improve employee wages to discourage union activity.

(b) Promulgating and enforcing an unlawful no-talking rule to discourage union activity.

(c) Issuing verbal warnings to employees because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(d) Increasing the wages of employees to discourage union activity.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-talking rule found unlawful above and advise employees at its Aiken, South Carolina store in writing that it has been rescinded,

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines to Kathleen MacDonald and Barbara Hall, and within 3 days thereafter notify these employees in writing that this has been done and that the disciplines will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its store in Aiken, South Carolina copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2001.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

_____
John H. West
Administrative Law Judge

[20] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT promise to improve your wages to discourage union activity.

WE WILL NOT promulgate and enforce an unlawful no-talking rule to discourage union activity.

WE WILL NOT issue verbal warnings to you because you joined, supported, or assisted the UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL.-CIO, CLC, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage you from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT increase your wages to discourage union activity.

WE WILL NOT in any like or related manner restraining or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful no-talking rule and advise you in writing that it has been rescinded,

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines to Kathleen MacDonald and Barbara Hall, and within 3 days thereafter notify these employees in writing that this has been done and that the disciplines will not be used against them in any way.

Wal-Mart Stores, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

4035 University Parkway, Republic Square, Suite 200, Winston-Salem, NC 27106-3323

(336) 631-5201, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (336) 631-5244.